D051805

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM,

Plaintiff and Respondent,

v.

MICHAEL AGUIRRE AND THE CITY OF SAN DIEGO,

Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY
(CASE NOS. GIC841845, GIC851286, GIC852100)
HON. JEFFREY BARTON, JUDGE

APPELLANTS' OPENING BRIEF

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MICHAEL AGUIRRE AND THE CITY OF SAN DIEGO

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, subdivision (d)(3), I certify that there are no interested entities or persons to list in this certificate.

Dated: April 18, 2008

Walter C. Chung
Deputy City Attorney

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is from a judgment dismissing the City of San Diego's cross-complaint seeking a declaration that 1996 and 2002 agreements—being used by the San Diego City Employees' Retirement System ("SDCERS") to collect hundreds of millions of dollars of pension debt from the City—are unenforceable. The SDCERS officials who made the 1996 and 2002 agreements violated the debt limit laws in the California Constitution and the City Charter, and they also violated state and local conflict of interest laws, rendering those agreements void and unenforceable as a matter of law. The enormous unfunded pension debt created by these unlawful agreements is substantially impairing the City's ability to repair roads, prevent fires, secure its water supply, and keep open City libraries, pools and recreation centers.

In 1996 and 2002, the SDCERS Board agreed to a plan to raise pension benefits and, to fund those increases, allowed the City to pay current year's pension costs with later year's revenues. These officials also obligated the City to use revenues from later years to pay retroactive increases in pension benefits. The SDCERS Board's actions violated the debt limit laws.

In 1996 and again in 2002, SDCERS officials allowed the City to make less than the actuarially-determined and legally-required contributions to the pension plan in exchange for the same officials receiving increases in their personal pension benefits. This *quid pro quo* exchange of underfunding the pension plan for increased pension benefits violated state and city conflict of interest laws.

These 1996 and 2002 transactions created a floating pension debt of several hundred million dollars ("Floating Pension Debt"). Earning interest at 8% per year, this Floating Pension Debt is the primary cause of the unbridgeable gap between pension costs and pension system assets. Each year, SDCERS continues to demand and collect from the City payments on the Floating Pension Debt created by these transactions.

The City's position is that the Floating Pension Debt is not a bona fide debt the City is required to pay. SDCERS takes the opposite position. The City therefore brought this action requesting a declaration that the agreements creating the Floating Pension Debt are void because they were entered into without a vote of the people in violation of debt limit laws contained in California Constitution, Article XVI, § 18 and San Diego City Charter, Article VII, § 99. The City also sought a declaration that the agreements are void because SDCERS officials who made the agreements had a prohibited financial interest, rendering the agreements void under State and City conflict-of-interest laws in Government Code §§ 1090, 1092 and City Charter, Article VII, § 94.

Declining to confront the weighty substantive questions posed by this case, in January 2007, after a Phase I trial, the trial court issued a Statement of Decision eviscerating the City's lawsuit on legally erroneous and largely technical grounds.

First, the trial court dismissed the City's debt limit law claim because it found SDCERS is not a proper party under the debt limit laws. This was erroneous because the SDCERS Board members are City officials who authorized the two transactions creating the Floating Pension Debt, and SDCERS continues to demand payments on the Floating

Pension Debt. As the governmental entity creating and enforcing the unlawful debt, SDCERS properly is sued for such actions under the debt limit laws.

Second, the court dismissed most of the City's conflict of interest claims under Government Code § 1090 and Charter § 94 because it found that later settlement agreements absolved the earlier violations. This was erroneous because the 1996 and 2002 agreements are void as a matter of law, and they cannot be ratified by subsequent contracts or other actions without a new vote by untainted board members preceded by full disclosure of the past conflicted vote—which unquestionably has not occurred. In addition, neither of the settlement agreements—involving different claims, issues and parties—has the *res judicata* effect found by the trial court.

Third, after permitting the City's unions to intervene as representatives of pension plan participants and to vigorously defend the 1996 and 2002 agreements for over a year, the court ruled that the individual plan participants are nonetheless necessary parties to this declaratory relief case. This was erroneous because the individuals are not parties to the void contracts nor are they accused of violating the laws in question. The sole questions presented are whether public officials breached their duties in making contracts in which they had financial interests and creating illegal debt. To the extent the individuals' interests in preserving their benefits are implicated in this lawsuit, the unions and other parties to the case adequately represent their interests, rendering their participation in this public interest lawsuit superfluous and unnecessary.

Finally, after Phase I of the trial, the court reversed its earlier ruling that the allegations in the cross-complaint create a fact issue as to the tolling of the statute of

limitations, and instead found an absolute one-year statute of limitations barred all of the City's remaining conflict of interest claims based upon a new appellate decision, *Brandenberg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350. The court found a time bar even though the better-reasoned authority applies a four-year limitations period for Section 1090 claims. Validating the City's position, in July 2007, the California legislature confirmed a four-year (from the date of discovery) limitations rule for the conflict of interest law, which the legislature clearly intended to apply to pending cases such as this one. Despite this statute, and the trial court's prior recognition of fact issues regarding tolling, the court sustained the unions' demurrer without leave to amend, based on fact findings as to matters outside the pleadings. The court then entered a judgment of dismissal against the City.

Each of these rulings is erroneous as a matter of law. More fundamentally, the trial court's hyper-technical approach is directly at odds with the broad prophylactic approach—necessary to protect taxpayers from self-interested government giveaways—that is mandated by debt limit and conflict of interest laws. The judgment of dismissal should be reversed.

II.

STATEMENT OF THE CASE

This lawsuit originally was filed by SDCERS on January 27, 2005, as a claim for declaratory relief and a preliminary injunction relating to the issue of the retirement system's legal counsel. In response, the City and City Attorney Michael J. Aguirre cross-complained against SDCERS, *et al.*, seeking, *inter alia*, a declaration that certain City

employee retirement benefits are the result of illegal transactions and therefore void, and a writ of mandate barring further payment of those benefits.

The City's operative cross-complaint was the Fifth Cross-Complaint ("5ACC"). 4 Clerk's Transcript ("CT") 945. It asserted two causes of action for declaratory relief against SDCERS. The first cause of action seeks a declaration that the 1996 agreement (known as Manager's Proposal I or "MP I") is illegal and void. 4 CT 958-59. The second cause of action seeks a declaration that the 2002 agreement (Manager's Proposal II or "MP II") is illegal and void. 4 CT 959-60. The City's 5ACC asserts that SDCERS officials violated prohibited financial interest and debt limit laws when they developed and approved City employee pension benefit increases in MP I and MP II because (1) those officials stood personally to benefit from the increases, (2) the benefit increases were contingent upon allowing underfunding of the pension system the officials were duty-bound to protect, and (3) the debt created exceeded same-year revenues without the required voter approval.

On July 26, 2005, SDCERS filed a new action for declaratory relief, entitled *San Diego City Employees' Retirement System v. City of San Diego*, San Diego Superior Court Case No. GIC851286. That action seeks the opposite relief from that requested in the City's 5ACC, *i.e.*, that the benefits were lawful and could continue to be paid.[1]

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[1] Subsequently, in support of its Motion for Summary Judgment, SDCERS clarified that it was not seeking a declaration that the benefits were legal but, rather, a declaration that SDCERS had paid and could continue to legally pay the benefits until such time as they were repealed or voided by the court.

In August 2005, over City opposition, the unions representing City employees and SDCERS pension beneficiaries, including the Municipal Employees' Association ("MEA"), Local 127, American Federation of State, County and Municipal Employees ("Local 127"), and San Diego City Fire Fighters, Local 145 ("Local 145") (collectively, the "Unions"), were granted leave to file complaints in intervention in support of SDCERS. 1 CT 174; 1 CT 139; 1 CT 188. The Unions' complaints seek, *inter alia*, a declaration that the benefit increases awarded under MP I and MP II are lawful despite the alleged violation of conflict of interest and debt limit laws. 1 CT 141-42, 185, 191.

Former City Clerk Charles Abdelnour and numerous individual non-union employees and retirees filed a third lawsuit against the City entitled *Abdelnour, et al. v. City of San Diego*, San Diego Superior Court Case No. GIC852100. The *Abdelnour* action alleged one cause of action for declaratory relief and requested a judicial determination that SDCERS may legally pay all contested pension benefits. 1 CT 205. The *Abdelnour* case was consolidated with Case No. GIC851286, which was then consolidated with Case No. GIC841845.

Over the City's objection, the Court divided the trial of the City's cross-complaint into phases. 12 CT 3114:6-10. In an order entered on September 15, 2006, and supplemented by a pretrial conference hand-out on October 26, 2006, the trial court granted the Unions' request for phased trial proceedings and divided the case into three phases, with the following issues to be heard in Phase I:

1. Whether the City is *estopped* as a matter of law from challenging the Managers Proposal I benefits by the prior Judgment in *Corbett.*

2. Whether the Fifth Amended Cross-Complaint presents an actual and justiciable controversy between the City and necessary parties;

3. Whether the City can pursue a claim that SDCERS violated the debt limit laws;

4. Whether the City's claims that MP I and MP II are null and void are barred because of the *Gleason* settlement and litigation;

5. Whether the Fifth Amended Cross-Complaint presents an actual and justiciable controversy on which the Court can render a meaningful, concrete and specific decree.

12 CT 3114:11-23.

Under the trial court's order, Phase II was to address statute of limitations defenses and Phase III was to determine all remaining issues, including the central questions relating to the allegedly invalidating conflict of interest and debt limit law violations. 10 CT 2419.

Trial on Phase I commenced on October 30, 2006, and concluded on November 29, 2006. The Unions had the burden of proof on each issue. 12 CT 3114:27-28. At the request of the trial court, the parties each submitted Proposed Statement of Decisions. 11 CT 2888; 12 CT 2908. On December 14, 2006, the trial court issued its Proposed Statement of Decision, 12 CT 3016, and the City filed lengthy objections. 12 CT 3061. After a hearing on the City's objections, 31 Reporter's Transcript ("RT") 5901, on January 18, 2007, the trial court issued its Decision. 12 CT 3113.

The court ruled adversely to the City in almost every respect. However, the Court permitted the City to file a Sixth Amended Cross-Complaint on a limited set of claims against a limited group of defendants. Following the filing of the Sixth Amended Cross-

Complaint, on August 3, 2007, the Court issued an additional order dismissing the remainder of the City's claims based upon the statute of limitations. 13 CT 3418.

III.

STATEMENT OF APPEALABILITY

On September 17, 2007, the Superior Court filed and entered its Judgment Against City of San Diego Dismissing its Sixth Amended Cross-Complaint In Its Entirety and With Prejudice ("Judgment"). Notice of Entry of the Judgment was served on September 20, 2007. On September 25, 2007, the City filed its notice of appeal, 13 CT 3462, which was amended on September 26, 2007. 13 CT 3465. The appeal was timely, *see* Cal. R. Ct., Rule 8.104(a), and the Judgment is appealable. *See, e.g., Justus v. Atchison* (1977) 19 Cal. 3d 564, 568, *overruled on other grds.* in *Ochoa v. Super. Ct.* (1985) 39 Cal. 3d 159, 171 (demurrer sustained without leave to amend as to some parties in multi-party action properly appealed; judgment which leaves no issue to be determined as to one or more parties immediately appealable); *Herrscher v. Herrscher* (1953) 41 Cal. 2d 3001, 303-304 (order of dismissal of cross-complaint immediately appealable where parties to cross-complaint not identical with parties to original action); *First Security Bank of California v. Paquet* (2002) 98 Cal. App. 4th 468, 473-75 (order sustaining demurrer on cross-claim without leave to amend immediately appealable).

IV.

STATEMENT OF FACTS

A. THE SDCERS BOARD IS A FIDUCIARY FOR THE CITY'S PENSION SYSTEM

The City Council established SDCERS pursuant to the City Charter, Article IX, § 141. SDCERS is funded by contributions from the City, payroll contributions, and earnings on the investment of the fund. A Board of Administration ("Board") was created to administer the City employee pension system and to ensure the City makes actuarially-required contributions. *See* Charter, Article IX, §§ 141, 144. Under the California Constitution, Article XVI, § 17(b), Board members serve as fiduciaries charged with acting in the best interests of plan participants and beneficiaries, and in the interests of the City as plan sponsor.

While pension boards such as SDCERS operate with autonomy in the administration of public employee pension plans, Cal. Const., Art. XVI, § 17(b), they are governed by general laws applicable to all government officials. *Westly v. California Public Employees Retirement System Bd. of Admin.* (2003) 105 Cal.App.4th 1095, 1106. Thus, as City officials, Board members are required to incur debt and to enter into City contracts in compliance with State and City debt limit and conflict of interest laws.

Under California Constitution, Article XVI § 18 and City Charter, Article VII, § 99, City officials cannot borrow from future year revenues to pay bills from earlier years without a vote of the people. The Constitution and City Charter provide in pertinent part:

> No . . . city . . . ***shall incur any indebtedness or liability in any manner*** or for any purpose ***exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public*** entity voting at an election to be held for that purpose . . . . Cal. Const., Art. XVI, § 18(a) (emphasis added).

> The City ***shall not incur any indebtedness or liability in any manner*** or for any purpose ***exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent*** as then required by the Constitution of the State of California . . . . San Diego City Charter, Article VII, § 99 (emphasis added).

Under the Government Code and City Charter, City officials (including SDCERS Board members) also have a duty to not make public contracts in which the officials have a personal financial interest. Government Code §§ 1090, 1092 and Charter § 94 provide in pertinent part:

> [C]ity officers or employees ***shall not be financially interested*** in any contract made by them in their official capacity, ***or by any body or board of which they are members*** . . . . Cal. Gov't Code § 1090 (emphasis added).

> Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein . . . . Cal. Gov't Code § 1092.

> No officer, whether elected or appointed, of The City of San Diego ***shall be or become directly or indirectly interested in,*** or in the performance of, ***any contract*** with or for The City of San Diego . . . . All contracts entered into in violation of this Section ***shall be void and shall not be enforceable against said City*** . . . . S.D. City Charter, Art. VII, § 94 (emphasis added).

As the statutory language confirms, agreements made in violation of these laws are void. *See infra* at 28-30.

B. WITH THE UNIONS' ENDORSEMENT, MP I WAS APPROVED BY THE SDCERS BOARD, WHOSE MEMBERS HAD PERSONAL FINANCIAL INTERESTS IN THE CONTRACT, WHICH CREATED UNFUNDED PENSION SYSTEM DEBT WITHOUT VOTER APPROVAL

1. The Adoption of MP I Was Contingent Upon SDCERS' and the Unions' Approval

MP I was memorialized in a June 1996 agreement which eventually was adopted by SDCERS, the City Council and the Unions. Trial Exhibit ("Ex.") 155; 12 CT 3121:15-27, 3120:23-3121:3. The proposal included two components—the Management Proposal and the City Employees' Retirement System Proposal ("Retirement System Proposal"). Ex. 155.6. Under the terms of MP I, the SDCERS Board had to approve the Retirement System Proposal. Ex. 85.2; Ex. 155.6. Each of the proposals was interdependent. *E.g.*, Ex. 276.93 ("The interrelationship of these various issues to each other necessitate that the entire proposal be considered and acted upon concurrently.").

MP I contained significant pension benefit increases, Ex. 50.6-7, Ex. 276.8, which could not be approved without the SDCERS Board's agreement to provide the City with funding relief. Ex. 276.6; 12 CT 3121:16-22; Ex. 50.4; Exs. 276.26, 276.131 ("if this is not approved . . . none of the benefit improvements would occur"); Ex. 84.5 ("The modification and increase of benefits . . . is contingent upon the Board's approval of [the funding portion of the proposal]").

Execution of the Management Proposal was also contingent upon the agreement of the Unions. Ex. 155; 19 RT 3101:4-15. The SDCERS Board's Special Workshop

minutes confirm that the plan was the subject of discussions between the City Manager's office and the Unions, as well as the SDCERS Board:

> [Mr. McGrory] indicated that the Manager's office had been ***discussing all of the aspects of their proposal with the employee groups and seeking their concurrence with the plan.***

Ex. 276.67 (emphasis added). Mr. McGrory also stated:

> [T]hat he believes that these two bodies [the Manager's Office and the Board], ***along with the employee organizations***, have developed an acceptable plan that will solve the City's short and long term problems with the System . . . .

Ex. 276.78 (emphasis added).

Union leaders advised that there would have to be a "vast improvement in the retirement formula" before they would use their influence to get their members—some of whom were on the pension board—to accept "any tampering with funding methods." In a May 17, 1996, letter from MEA lawyer Ann Smith to the City, Ms. Smith wrote:

> I also cannot over-emphasize that the level of employee scepticism [sic] and distrust regarding ***any tampering with funding methods*** related to the retirement system is enormous and will require a yeoman's effort by every person associated with MEA to overcome. ***MEA will not undertake this formidable task unless the gains in benefit levels for the employees MEA represents are clearly respectable*** and credible rather than de minimus [sic]. Frankly, at this juncture, the proposal to increase the general member's formula from 1.48% to 1.75% at age 55 is de minimus when contrasted with a proposed safety formula of 3% at age 55 and 2.74% at age 50.

Ex. 87.1 (italics added). The MEA President admitted that "all of the unions" had to approve MP I. 19 RT 3100:27-3101:1-15.

The tentative agreements making up MP I were formally adopted by the City Council on July 2, 1996. Ex. 155. The understandings contained in MP I were then

included in the Unions' Memoranda of Understanding, Ex. 1115 (MEA); Ex. 1119 (Fire Fighters); Ex. 1123 (Local 127), and in a memorandum of July 23, 1996, from Cathy Lexin, the City's Labor Relations Manager, to Larry Grissom, SDCERS' Administrator. Ex. 85.

2. With MP I, SDCERS Authorized a Debt In Which Future Revenues Would Be Used to Pay for Current Increased Benefits

The Retirement System Proposal, the second part of MP I, made clear the City would borrow revenues from later years to pay for the increased benefits in earlier years. Ex. 155.6. In some years, the City's pension contribution would decrease 3 percent to 4 percent, for a total decrease in funding obligation over the life of the agreement of $110.35 million. Ex. 276.97.

Specifically, MP I created a schedule under which the City would pay an "agreed to rate" from FY1996 to FY2008 ***that was substantially below the actuarially-calculated rate***. The deal was therefore anticipated to lead to a substantial decline in the funding for the pension plan because the City was paying less than the actuarially-required rate and because benefits were simultaneously increased, including retroactively. 12 CT 3120:22-25, 3121:1-4; Exs. 43.3, 276.78-276.79, 276.81, 276.140.

Anticipating the decline in the funded ratio due to decreased contributions, MP I established a minimum level or floor, known as the "trigger," to which the funded level would be permitted to fall. Ex. 85.8 (Issue No. 3 – Employer Contribution Rates, B.); Ex. 276.157; Ex. 276.161. If the funded level dropped below 82.3 percent, the City was required to make a one-time "balloon" payment into the pension system to return the

funded ratio to 82.3 percent. Ex. 85.8; Ex. 276.157; Ex. 276.161. If the trigger was violated, the "agreed to rate" schedule would be abandoned and the City would immediately begin paying the full actuarially-calculated rate. Ex. 85.8; Ex. 276.157; Ex. 276.161.

The resulting pension debt created by this intentional underfunding—in which the City's contribution rates were reduced from actuarially-determined rates to agreed rates—is reflected in the Retirement System Proposal part of MP I under the heading, "Issue No. 3 Employer Contribution Rates"—a chart showing the yearly shortfall:

EMPLOYER CONTRIBUTION RATE STABILIZATION PLAN				
PERIOD	PUC RATE	CITY PAID RATE	DIFFERENCE %	DIFFERENCE $
FY96	8.60%	7.08%	1.52%	**$5.33M**
FY97	10.87%	7.33%	3.79%	**$13.88M**
FY98	12.18%	7.83%	4.35%	**$16.67M**
FY99	12.18%	8.33%	3.85%	**$15.40M**
FY2000	12.18%	8.83%	3.35%	**$14.00M**
FY2001	12.18%	9.33%	2.85%	**$12.45M**
FY2002	12.18%	9.83%	2.35%	**$10.72M**
FY2003	12.18%	10.33%	1.85%	**$8.82M**
FY2004	12.18%	10.83%	1.35%	**$6.73M**
FY2005	12.18%	11.33%	.85%	**$4.43M**
FY2006	12.18%	11.83%	.35%	**$1.91M**
FY2007	12.18%	12.18%	-0-	**-0-**
FY2008	13.00%	13.00%	-0-	**-0-**
TOTAL				**$110.35***
*$110.35 million paid from excess earnings includes $71.31 million in contributions as a result of benefits improvements recommended herein.				

Ex. 155.10; Ex. 276.97 (emphasis added).

At the time MP I was considered, some SDCERS Board members criticized the scheme for creating a debt to be borne by future taxpayers. For example, one SDCERS Board member questioned "whether ***future tax payers*** would be placed in a position of having to pay for these benefit increases if they are adopted . . . ." Ex. 276.81 (emphasis added). Another Board member reminded the Board of City Charter § 99's requirement that today's bills must be paid with today's money:

> Mr. Casey stated that there is an underlying statement in the ***Charter that indicates that today's service credit must be paid for by today's taxpayers***. He stated that this proposal gives him the distinct impression that ***future taxpayers will be paying for these benefit increases*** . . . .

Ex. 276.82 (emphasis added). Mr. Casey further observed:

> [I]f this proposal is implemented, he has concerns that the younger generation will be expected to pay retirement benefits for today's generation. He stated that he does not believe this is appropriate.

Ex. 276.82. The system's actuary agreed that "some of these costs will be borne by the future generation." Ex. 276.82.

Fiduciary counsel to the Board, Dwight Hamilton, thought the agreement raised "red flags":

> ***He stated that there were "red flags" raised in his mind by this proposal as it relates to the Board's duty of loyalty to the integrity of the fund*** . . . .

Ex. 276.84 (emphasis added). Mr. Hamilton also

> reminded the Board that the pension beneficiaries and members have a vested right to an actuarially sound system and that ***the Board has a duty of loyalty to the integrity of the fund that can not be contracted away***.

Ex. 276.86 (emphasis added).

Another Board member, Anne Parode, echoed this point, stating that "current employees would be excited about receiving improved benefits," and therefore it was the fiduciaries' duty to be "concerned about the long-term funding of the System." Ex. 276.88. "[S]he questioned how far unfunded a system can become before becoming susceptible to a challenge on the Board's management of the fund." Ex. 276.88. Dwight Hamilton responded that "***the liability of current employees/retirees are [sic] being transferred to future taxpayers***." *Id.* (emphasis added).

SDCERS' fiduciary counsel also confirmed that MP I would create immediate liability to the pension system without a corresponding funding mechanism. In a letter dated June 21, 1996, SDCERS' counsel noted the liability to the system created by the past service liability would be $76.7 million, plus $30 million in contribution shortfall liability:

> No contributions have been received in the past to fund the increased benefits, and thus the result is an increased liability [of $76.7 million]. . . . The actuary estimates that the amount of contribution shortfall liability created . . . is $30 million expressed in 1996 dollars.
>
> The total of estimated increased liabilities associated with the City Manager's proposal is $106,700,000 . . .

Ex. 276.157-276.158.

Bruce Herring, SDCERS Board member and Deputy City Manager at the time of MP I, testified at trial that MP I decreased contributions below the actuarially-required contribution rate while increasing benefits. 15 RT 4889:26-4890:14. Herring admitted that ***the City was postponing full payment for the cost of the increased benefits***. 15 RT 4889:26-4890:24.

MEA President Judith Italiano also confirmed that payment of increased benefits under MP I was to be postponed and paid years after the City incurred the cost, thereby creating an unfunded debt to be paid in later years:

> Q. Was it your understanding that essentially that you were, by doing this, ***agreeing to basically create more debt that the City was going to have to pay later?***
>
> A. I did not –***yes, I understood that the City was going to defer part of what it owed yes***.

Ex. 2205 at 197:22-198:2 (emphasis added).

Ms. Italiano testified: "We agreed to allow the City to ramp up their payments over a period of time in return for an improvement in benefits." Ex. 2205 at 222:19-21. She admitted that payment for the pension benefits would be postponed:

> Q. So you understood ***what you were doing here was agreeing to postpone the payment of the pension benefits to taxpayers in later years?***
>
> A. ***Correct***. So that the taxpayers could get service immediately, ***they were going to pay later down the road.***
>
> Q: Well, the same taxpayers wouldn't be paying later, would they?
>
> A: I have no idea. Probably not.

Ex. 2205 at 198:10-19 (emphasis added).

The City's actuarial expert, Joseph Esuchanko, confirmed that MP I shifted earlier year's pension costs to years after the pension debt was incurred. Ex. 1446.6-1446.8.

3. SDCERS Officials Had Financial Interests In MP I Yet Voted to Approve MP I as Part of a "Package" In Which the Benefit Increases Were Linked to System Underfunding

The Retirement System Proposal in MP I contained substantial benefit increases for all City employees, including increasing the retirement factor on which benefits were calculated. *See* Ex. 155.7-.9. The terms of MP I made clear that City officials on the SDCERS Board would have to agree to push pension debt to the future and to underfund the pension system to obtain an increase in their personal pension benefits. *See supra* at 11.

The SDCERS Board adopted MP I at the June 21, 1996, Board meeting by an 8-3 vote. SDCERS Board members Terri Webster, Sharon Wilkinson, Ron Saathoff, John Torres and Bruce Herring provided the swing votes in favor of MP I. Ex. 276.148; 26 RT 4851:20-4852:23. Each stood to gain personally from the benefit increases that they were enabling by approving the system underfunding plan, as the trial court specifically found:

> Several of the SDCERS board members, including Webster, Torres, Wilkinson, Saathoff, ***voting in favor of the proposal were City employees whose retirement benefits were improved by the City's enactment of the new benefits***. The testimonial and documentary evidence established the ***City made the grant of enhanced pension benefits contingent on SDCERS approving the funding relief***.

See 12 CT 3121:15-22 (emphasis added).

For example, Mr. Herring, as a City employee and member of the SDCERS Board, participated in making the MP I agreement, in which he had financial interests. Ex. 276.148; Ex. 276.179; 26 RT 4851:17-4853:8, 4865:27-28, 4866:1-6, 4866:19-28, 4867:1-11, 4875:7-25. Mr. Herring admitted he did not disqualify himself from voting

on MP I and that there were no votes taken after full disclosure of his financial interest in MP I. 26 RT 4871:5-11. Mr. Herring made it clear to the "labor organizations" in 1996 that the increased benefits were "dependent upon getting the MP I package through at SDCERS." 26 RT 4859:13-22.

The City's actuary, Joseph Esuchanko, testified that City officials who negotiated and approved MP I received thousands of dollars in personal benefits as a result of their approval. Ex. 1446.15; 12 CT 3121:15-20.

C. WITH THE UNIONS' ENDORSEMENT, MP II WAS APPROVED BY SDCERS BOARD, WHOSE MEMBERS HAD PERSONAL FINANCIAL INTERESTS IN THE CONTRACT, WHICH CREATED UNFUNDED PENSION SYSTEM DEBT WITHOUT VOTER APPROVAL

1. The Adoption of MP II Was Contingent Upon SDCERS' and the Unions' Approval

Following the blueprint of MP I, MP II grew out of conversations, formal negotiations, and private and public meetings between City officials, SDCERS Board members, and the City's Union leaders and their lawyers. Ex. 272; Ex. 274; Ex. 276.61-63; Ex. 276.179-196; Ex. 276.203-239; Ex. 277; Ex.282; Ex. 311; Ex. 331; Ex. 357.

To avoid the MP I trigger, which activated when the funded level of the plan fell below 82.3%, on or about June 10, 2002, the City Manager proposed that MP I be modified to establish a 75% floor for the actuarial funded ratio. Ex. 276.179. This ***decrease*** in funding requirements was to be coupled with another ***increase*** in the General Member benefit rate. Ex. 274; Ex. 276.179; Ex. 311; Ex. 357.

As with MP I, the Unions participated in MP II from the outset. Indeed, the record repeatedly reflects that MP II arose out of "labor negotiations." *E.g.*, Ex. 1350. The Unions were notified that MP II directly linked increased benefits to SDCERS' acceptance of reduced contributions:

> Substantial benefit improvements granted by the City since the adoption of the "City Manager's Retirement Proposal" dated July 23, 1996 [MP I] have created additional unfunded liability to SDCERS that was not anticipated when the City agreed to the "trigger" provisions. ***Significant improvements in benefits are contained in this three-year proposal.*** Consequently, the "trigger" provisions must be adjusted as a condition of the City's three-year proposal. Therefore, ***this three-year proposal is contingent upon, and subject to, approval by the SDCERS Board of Trustees of an adjustment to the "trigger" provisions contained in the Manager's Proposal [I]*** . . . .

Exs. 272.2, 272.6 (City of San Diego Proposal to the Municipal Employees Association, May 13, 2002) (emphasis added).[2]

Thus, MP II's *quid pro quo* of SDCERS granting funding relief in exchange for benefit increases was well known to the Unions. *See, e.g.*, Ex. 382; 19 RT 3070:5-20 (MEA membership was informed through "Hotsheets" and other communications that "***the City's willingness to include retirement benefit improvements was contingent on***

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[2] *See also* Ex. 311.2 (Proposal to Local 127) (same); Ex. 274.3 (Proposal to Local 145) ("this three year [benefits] proposal is contingent upon, and subject to, approval by the SDCERS Board of Trustees of an adjustment to the 'trigger' provisions contained in [MP I]"); Ex. 282.2 (Proposal to POA) (same); Ex. 357 (MEA Hotsheet) ("UPDATE: Members Ratify Contract Contingent Upon Retirement Board Decision . . . . The availability of these benefit improvements depends on a favorable vote of the Retirement Board of Trustees on the City's request for a payment plan, which would lower the current 'trigger' from 82.3% to 75%. The Retirement Board of Trustees will meet July 11th . . . Please attend this meeting – we need your support"); Ex. 357; 21 RT 3829:5-10 (Testimony of Dan Kelley).

the Retirement Board's willingness to adopt the City's proposed new terms and conditions related to contributions and funding levels") (emphasis added); Ex. 357 (July 1, 2002 MEA "Hotsheet") (explaining to MEA members that "[t]he availability of these benefit improvements depends on a favorable vote of the retirement board of trustees on the City's request for a payment plan which would lower the current trigger from 82.3% to 75%.").

On June 21, 2002, the SDCERS Board discussed MP II at a public meeting. Ex. 276.179-180. Deputy City Manager Bruce Herring formally proposed MP II to the SDCERS Board, noting that the funding proposal is "***tied into the tentative labor agreements***." Exs. 276.179-180, 276.194 (emphasis added).

SDCERS Administrator Lawrence Grissom confirmed the linkage between the Board's action and the benefit increases:

> He explained that during this year's meet and confer process, the City and Labor Organizations agreed to some ***benefit enhancements which were subject to the Board's approval of a modification of the 1996-1997 Manager's Proposal.***

Ex. 276.203 (emphasis added). Mr. Grissom also reported:

> that these issues evolved out of the meet and confer process [between the City and the unions], in which a number of ***benefit enhancements were agreed upon, but made contingent upon the Board's approval of the Manager's funding proposal . . . . What the City is asking the Board to do is approve . . . a funding mechanism that would allow these benefit enhancements to be conferred.***

Ex. 276.179-180 (emphasis added).

Bob Blum, SDCERS' fiduciary counsel, warned the Board that this linkage between funding reductions and benefit increases was improper:

> ***The Board must also decouple negotiations and fiduciary decisions. One of the reasons this is such an awkward situation is that these two things have been brought together, which is very unfortunate*** . . . . The fact this year's proposal was coupled with negotiations was quite inappropriate. ***The Board's job is to administer the fund to the best of its ability and set standards, not to negotiate benefits.***

Ex. 276.189 (emphasis added).

This warning resulted in modification of the MP II proposal. Ex. 1350. Included as Attachment 1 to the proposed modification were answers to questions that Board members had asked. Richard Vortmann asked "the Manager to explain ***why the Board was put in the middle of labor negotiations***, and how we will conduct union negotiations in the future differently to prevent this inappropriate situation." Ex. 1350.3. (Question 2) (emphasis added). The answer confirmed that the Board was the ***lynchpin*** in enabling the benefit increases by allowing the underfunding to continue (and increase):

> Aware of the effect of the market decline and reduced SDCERS earnings during FY2002, the City developed concerns about a further decline in the funded ratio for the June 30, 2002 valuation and became concerned about the effect of "triggering" the full actuarial rates in FY04 contemplated in the 1996/97 Manager's Proposal.
>
> The City, through labor negotiations, agreed that the 2.50% at age 55 [increase] is an appropriate benefit to bestow. The City, however, was not willing to grant this benefit, given the cost, if at the same time, it might be facing a jump in retirement contribution which would further modify the rates to full actuarial rate (+$25 million) as a result of the "trigger." Consequently, the City agreed ***contingent*** upon the resolution in this proposal.

Ex. 1350.4 (emphasis in original).

On July 11, 2002, Mr. Herring presented a modified MP II proposal to the SDCERS Board. A Motion was made to support the Proposal. Ex. 276.227. In the Board's discussion, the actuary (Mr. Roeder) noted:

> [He] was more comfortable with the original proposal [MP I] because there were some safety nets that provided enough confidence that if hard times hit, the funding integrity of the System would not be negatively impacted. However, times are much different now. ***As such, he can't give the Board assurance today***.

Ex. 276.227-276.228 (emphasis added).

Nonetheless, Ann Smith, counsel for MEA, wholeheartedly supported MP II before the Board, saying that it "is an important part of MEA's analysis to seek benefit improvements which includes doing its own analysis, to retain its own advisors with regard to the City's budget" to protect the represented employees. Ex. 276.223 ("***Having reviewed the Manager's proposal, MEA has confidence in the integrity of what is being presented. If not, they wouldn't have supported it.***") (emphasis added). Ed Lehman spoke on behalf of Local 127, supported the proposal and "encouraged the Board to act on this proposal today." Judith Italiano also supported the measure and urged MEA's membership to support the proposal. Ex. 358 ("Hotsheet" urging MEA membership to vote to approve MP II).

Ultimately, Board member (and Union president and City employee) Ron Saathoff ***enabled passage of MP II*** by bringing a substitute motion. Ex. 276.234. Trial evidence confirms that Saathoff's motion was a pre-planned maneuver. Ex. 277.2 (Lexin Memorandum to City Council dated July 8, 2002) ("Based on our conversations with the Retirement Administrator, we anticipate a motion from a Board member which would

further modify the proposal before the Board, by eliminating the request to lower the funded ratio floor, and including the five year phase - in if the trigger (82.3 percent funded ratio) is effectuated"). 12 CT 3126:3-18; Ex. 373 (closed session minutes approving modification if necessary).

On November 15, 2002, the SDCERS Board approved the final terms of the funding agreement with the City. Ex. 742. On November 18, 2002, the Council approved the resolution authorizing the City's agreement with SDCERS on MP II, as previously approved by the Board. Ex. 109.

As part of MP II, the City entered three Memoranda of Understanding with Unions. Ex. 1118, Ex. 1122; Ex. 1125. The City and SDCERS also entered into a written agreement entitled "Agreement Regarding Employer Contributions Between the City of San Diego and the San Diego City Employees' Retirement System." Ex. 172.

2. SDCERS Agreed in MP II to Again Borrow Money From Future Revenues to Pay for Current Increased Benefits

With MP II, SDCERS again agreed to fund increased benefits not with current payments, but by borrowing from future years' revenues without a vote of the people. Ex. 331; 19 RT 3068:18-3069:3, 3070:5-21; 12 CT 3124:25-3125:3.

Richard Vortmann, a SDCERS Board member, testified at trial that "[v]ery clearly in regard to the pension . . . the City was not paying its bills currently. They were referring liability into the future." 26 RT 4806:6-9. He testified that the City was incurring liability "today and pushing off the payment of those [liabilities] to future years." 26 RT 4806:10-12. *See also* Ex. 371.2 (Vortmann letter stating: "The problem is

very simply that the city does not want to pay currently for what they want to give the employees. They clearly are addicted to the 'give now, pay later' or 'burden the future year's taxpayers' when they no longer have any say in the decision – i.e., the decision being locked down now, with the mandatory bill being paid later.") (emphasis in original).

Former Deputy City Manager Bruce Herring also admitted that payment for the benefits was being pushed to later years.

Q: So the proposal was to decrease the contributions below actuarial required contribution rate, correct?

A: Correct.

Q: And then at the same time to increase benefits?

A: Yes.

Q: And what way was the City going to pay for that?

A: By making their annual payment that eventually pays off the unfunded liability of the system over the amortization period.

Q: In other words, in the later years?

A: At the end. You know, at the end of the day.

26 RT 4890:9-21.

The City's actuarial expert, Joseph Esuchanko, confirmed that—as a result of SDCERS' approval of the MP II funding deficit—the City's contributions were reduced in the earlier years and instead postponed to later years. Ex. 1446.6-1446.8. Under MP I and MP II, SDCERS' "unfunded actuarial accrued liability had grown from $46.8 million dollars prior to Manager's Proposal I, to $1.157 billion dollars. It further grew to a

deficit of 1.394 billion at June 30, 2005." 25 RT 4580:1-27. The funding level of the pension plan dropped from 97.1% to 67.2%. 25 RT 4581:3-8.

3. SDCERS Officials Had a Financial Interest in MP II

The SDCERS Board approved MP II, voting 8-3 in favor of passing the motion, with Saathoff, Vattimo, Wilkinson, Torres, Webster and Lexin among those voting in support. Ex. 276.239. Thus, MP II was an outgrowth of MP I, developed, sponsored and approved by many of the same SDCERS Board members—Herring, Lexin, Webster, Saathoff and Wilkinson—who adopted MP I. Ex. 276.61; Exs. 276.179-195, 276.203-239; 22 RT 3815:24-3816:3, 3816:9-3817:23; 26 RT 4875:7-25.

Each of these individuals stood to gain financially from the benefit increased they were enabling. Ex. 1446.15; 23 RT 4149:24-4151:9. For example, Ron Saathoff, a City employee, was serving as a SDCERS Board member when the Board approved a key benefit enhancement in MP II that personally benefited him. As part of MP II, Mr. Saathoff received the "Presidential Benefit" allowing him a personal pension benefit based in part on his union salary, in addition to his City salary. Ex. 61 (Res. No. 297212); Ex. 73 (Res. No. 297213).

The City's actuary, Mr. Esuchanko, testified that City officials who negotiated and voted for MP I or MP II received total personal gains of $1.9 million. Ex. 1446.15; 23 RT 4149:24-4151:9.

The unsound pension funding plan embodied in MP I and exacerbated in MP II was therefore adopted by financially interested members of the SDCERS Board in both

1996 and 2002. 12 CT 3121:15-20, 3124:25-27; Ex. 276.148; 26 RT 4851:20-4852:25; Ex. 1446.6-1446.8; 12 CT 3121:15-22; 12 CT 3124:25-3125:1.

Critically, these SDCERS Board members not only voted to increase their own pension benefits, but to enable the benefit increases to occur, they allowed the underfunding of the pension system—a system which, under the California Constitution, they had a fiduciary duty to protect. *See* 12 CT 3142:6-10 ("The responsibility of SDCERS in the transaction was ***to allow the underfunding***.") (emphasis added.); Ex. 276.203 ("benefit enhancements . . . were subject to the Board's approval of [MP II]"). Mr. Herring admitted at trial that benefit increases were offered with the hope that those receiving them on the Board would be more likely to approve of the reduced funding:

> Q: Was one of the motivations that if you thought that if you attached benefits to the relaxation of the trigger request, that it would be more inclined to pass the board?
>
> A: Probably.

28 RT 5320:17-21.

These 1996 and 2002 benefits increases remain in the City Municipal Code, and SDCERS continues to use them to calculate the City's required pension contribution. *See* S.D. Muni. Code §§ 24.0402 (Table 1), 24.0403 (Table 1); Ex. 1446.

V.

STANDARDS OF REVIEW

As a question of law, interpretation of the debt limit laws in the California Constitution, Art. XVI, § 18 and City Charter, Art. VII, § 99 is reviewed de novo. *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432. Interpretation of

Government Code §§ 1090, 1092 and Charter, Art. VII, § 94 is also subject to independent review. *Carson Redevelopment Agency v. Padilla* (1996) 140 Cal.App.4th 1323, 1329. The standard of review is de novo, as well, for the interpretation of the MP I and MP II contracts, the *Corbett* judgment, and the *Gleason* settlement agreement. *See In re Mission Ins. Co.* (1995) 41 Cal.App.4th 828, 835 (interpretation of settlement agreement reviewed de novo); *Coast Plaza Doctors Hosp. v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684 (court reviews language of contract de novo). Finally, whether the trial court correctly decided res judicata is a question of law reviewed de novo by this Court. *E.g.*, *Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 907.

The standard of review under Code of Civil Procedure Section 389, relating to necessary parties, as to whether the absent party's interest is impaired by the litigation is de novo. *People ex rel. Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 875. The court's decision as to whether to proceed in the absence of necessary parties is reviewed for an abuse of discretion. *Kaczorowski v. Mendocino County Bd. of Supervisors* (2001) 88 Cal.App.4th 564, 568.

VI.

LEGAL DISCUSSION

The trial court's decisions should be evaluated against the backdrop of the State and City conflict of interest and debt limit laws. The purpose of those good government laws is to protect citizens from government abuses, particularly self-interested and politically expedient expenditures of public funds by public officials. *Thomson v. Call* (1985) 38 Cal.3d 633, 650; *Millbrae Ass'n for Residential Survival v. City of Millbrae*

(1968) 262 Cal.App.2d 222, 237. To enforce their broad remedial purposes, the statutes are given expansive, pragmatic application, and technical barriers to relief are disfavored. *E.g., Carson Redev. Agency v. Padilla,* 140 Cal.App.4th at 1330 ("[T]he Legislature was not concerned with the technical terms and rules applicable to the making of contracts, but instead sought to establish rules governing the conduct of governmental officials. Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose") (citations omitted). *See also Chapman v. Super. Ct.* (2005) 130 Cal.App.4th 261, 274 (the "term contract is interpreted broadly under section 1090 and includes the 'negotiations, discussions, reasoning, planning, and give and take [that] go beforehand in the making of decision'"); *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1294 (courts "look past the individual contracts in question and consider[] the relationships between all parties connected with them, either directly or indirectly, to determine if a conflict of interest existed.").

Consistent with this intent, the remedy for violation of these statutes is to void the tainted official action. Cal. Gov't Code § 1092; *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 877; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-80; *In re Barlow* (1984) 67 Op. Atty. Gen. Cal. 369, 1984 WL 162079, *5 ("Contracts made in violation of section 1090 . . . are in fact void"). Disgorgement of any payments made under the void agreement or action is also mandatory. *Carson Redev. Agency v. Padilla, supra,* 140 Cal.App.4th at 1334-37 (disgorgement is "automatic"); *Finnegan, supra,* 91 Cal.App.4th at 583. "[T]he city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the

contract." *Thomson v. Call, supra*, 38 Cal.3d at 647. This remedy is "consistent with the policy of strict enforcement of conflict-of-interest statutes, it provides a strong disincentive for those officers who might be tempted to take personal advantage of their public offices, and it is a bright-line remedy which may be appropriate in many different factual situations." *Id.* at 652.

Just as in *Thomson, Padilla* and *Finnegan*, the court here was confronted with government contracts which were tainted by conflicts of interest (and debt limit law) violations. As will be shown below, instead of applying a broad pragmatic analysis and the mandatory remedies of voiding and disgorgement, the court here did precisely what it should not do: It engaged in a highly technical analysis of the agreements and the surrounding circumstances to uphold the agreements in the face of obvious illegality, and it refused to enforce the mandatory remedies of voiding and disgorgement. In so doing, the court ignored an unbroken body of case law establishing that the significant public policy goals which mandate strict enforcement of good government statutes take precedence over all other interests.

A. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT THE CITY CANNOT PURSUE A CLAIM THAT THE DEBT LIMIT LAWS WERE VIOLATED

California and City laws provide that no public indebtedness incurred in any one year shall be paid out of the income or revenue of any future year without a vote of the people. *See* Cal. Const., Art. XVI, § 18(a) ("No ... city ... shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the

public entity voting at an election to be held for that purpose ...."); S.D. City Charter, Art. VII, § 99 (same).

The purpose of these debt limit laws is to end the practice among local governments of incurring liabilities in excess of income thereby creating a "floating debt to be repaid from the income of future years." *Pension Obligation Bond Committee v. All Persons Interested* (2007) 152 Cal.App.4th 1386, 1397.

The debt limit laws instead establish the "pay as you go" principle as a cardinal rule of municipal finance. *San Francisco Gas Co. v. Brickwedel* (1882) 62 Cal. 641, 642. As explained by the California Supreme Court,

> [t]he system previously prevailing in some of the municipalities of the State by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. ***It was to put a stop to all of that, that the constitutional provision in question was adopted.***

Id. (emphasis added).

The courts have understood that some will have to suffer in order to achieve the benefits of the "wholesome restriction upon municipalities," which restrains the power of public officials to burden their cities with debt in excess of revenues:

> Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if ***some shall be found to suffer.*** But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that limit is not exceeded. With proper

> care on their part and on the part of the representatives of the municipality, there is no danger of loss.

Id. (emphasis added).

Thus, however unfortunate the results may be, the consequences of this mandatory rule do not limit or affect implementation of the law: "The fact that great hardships result in individual cases from an observance of the rule has been recognized in several of our decisions, but as has been well said, 'this fact cannot afford reason for subverting the law or frittering it away.'" *Arthur v. City of Petaluma* (1917) 175 Cal. 216, 224.

In approving MP I and MP II, and increasing pension benefits by adding debt to the pension system, the SDCERS Board borrowed money from future revenues to pay for increased pension benefits without the vote of the people in violation of state (and City) debt limit laws. *See State ex rel. Pension Obligation Bond Committee v. All Persons Interested, supra*, 152 Cal.App.4th at 1390 (state legislature cannot borrow money to pay for pension debt without vote of the people). MP I and MP II placed SDCERS on an unsound financial basis because these agreements created and extended a funding plan where liabilities were not provided for as they were incurred. *Ibid.* (putting pension system on sound financial basis means liabilities are funded as incurred rather than when they mature). Instead, revenues from later years were borrowed without a vote of the people to pay the increased pension liabilities from earlier years, thereby creating the Floating Pension Debt. *E.g.,* 11 RT 1116:12-18; 26 RT 4890:9-14; 26 RT 4890:15-24; 19 RT 3151:20-23; 26 RT 4806:6-12 (City was incurring liability "today and pushing off the payment of those [liabilities] to the future years."); Ex. 2205, Italiano Deposition

Excerpt at 197:22-198:4, at 4, clip 4) ("Q. Was it your understanding that essentially you were, by doing this, agreeing to basically create more debt that the City was going to have to pay later? A. I did not—***yes, I understood that the City was going to defer part of what was owed, yes***. Q. And who was going to pay for that? A. The City.") (emphasis added); *see also* Ex. 2205, at 4, clip 3 (222:19-21); Ex. 371.2.

Instead of funding the retroactive and future benefits adopted in 1996 and 2002 on a current basis when they were incurred, SDCERS actually did the converse—the Board entered into contribution deferral agreements authorizing payments of tens of millions of dollars less to the pension system than was required by law. *See, e.g.*, Ex. 155.10; Ex. 276.137.[3]

This action by the SDCERS Board violated state and local debt limit laws, rendering the actions void.

1. The Trial Court Completely Misread the Debt Limit Laws

Despite the wealth of evidence that the debt limit laws were violated, in perhaps the starkest legal error in its decision, the trial court ruled that "the *Gleason* settlement ***ended*** the contribution relief by SDCERS, and thus the City's reliance on setting aside the benefits under the debt limit laws by suing SDCERS alone, is unavailing." 12 CT

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[3] The City did not in fact pay any money to fund the benefits, and the allegedly surplus earnings were retirement fund assets, and not City money. As MEA President Judith Italiano testified: "Q. Where was the money going to be made up that wasn't being contributed as was required by the actuarial computation? A. . . . I think we were all expecting from what we knew about it was that the earnings of the system were . . . going to grow," and "as everyone made their contributions and the assets grew, that it would equal out at the end." 19 RT 3083:20-3084: 13.

3118:20-22 (emphasis added). That holding completely misapprehends what the debt limit laws prohibit.[4]

The debt limit laws plainly prohibit the ***creation*** of debt without corresponding revenue. *See* Cal. Const., Art. XVI, § 18(a) ("No ... city ... shall ***incur*** any indebtedness...") (emphasis added). It is incontrovertible that in MP I and MP II, the SDCERS Board approved and enabled benefit increases without corresponding sources of funding (indeed, while reducing the available funding in the system). It is this ***creation*** of unlawful debt that is the focus of the City's claim. The trial court's conclusion that "[t]he only possible offending actions attributable to SDCERS have already been rescinded," 12 CT 3142:21-23, is completely irrelevant to whether illegal debt was created through the actions of SDCERS in the first instance. There is no suggestion by anyone that damage caused by SDCERS' actions in approving and enabling the unlawful benefit in creases has been undone—that is the primary source of the immense pension deficit, which is now between $1 billion and $1.4 billion.

Completely ignoring its own findings as to SDCERS's role in creating the illegal benefits, the court writes: "The responsibility of SDCERS in the transaction was ***to allow the underfunding***. Yet, the underfunding allowed by SDCERS has already has been set aside in the *Gleason* settlement. Therefore, the portion of the transaction that involves SDCERS and its alleged contribution to the debt has already been undone." 12 CT

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[4] The *Gleason* settlement is discussed in detail *infra* at 76-85. The settlement terminated the City's future ability to underfund the pension system by requiring contributions at the actuarially-required rate. ***It did not alter the benefit increases adopted in MP I and MP II.*** Ex. 433.

3142:5-10 (emphasis added). This is gross error: aside from being factually incorrect,[5] the trial court's finding that the 2004 *Gleason* settlement prospectively ***ended*** the ***underfunding*** of the pension system is totally irrelevant to whether, in 1996 and again in 2002, the debt limit laws were violated when SDCERS "allow[ed] the underfunding" enabling the contingent ***benefit increases*** and thereby ***creating*** the unlawful debt in the first instance. Indeed, the notion that the debt limit law prohibition was solved by the City ***paying more money*** through the *Gleason* settlement is ludicrous. The court cites no authority for its unfounded reading of the debt limit laws, and there is none.

The court also suggests that the City may not sue SDCERS for violations of the debt limit laws because SDCERS "does not set benefits and has no power to either set or rescind benefits." 12 CT 3140:27-28. There is no question under the evidence, however, that the SDCERS Board adopted the benefit increases in question and enabled the City to increase the benefits by permitting the underfunding—the entire scheme was entirely contingent on SDCERS' approval of the funding relief. 12 CT 3121:20-22. Indeed, as the court itself writes later in the Decision, "***the City produced extensive evidence in Phase One of the trial that shows the City's grant of benefits in MP 1 and MP 2 were contingent upon the grant of funding relief by the SDCERS Board.***" 12 CT 3144:24-26 (emphasis added); *see also* 4 CT 813:27 (SDCERS Compulsory Cross-Complaint at 4, ¶

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[5] According to the allegations of numerous parties against the City, *Gleason* did not resolve all issues against the City relating to underfunding. As the Decision notes, the City was sued again in 2005 for underfunding arising out of MP I and MP II in the *McGuigan* lawsuit. 12 CT 3128:4-5. SDCERS itself has filed a compulsory cross-complaint in this lawsuit, alleging that the City has underfunded the pension system as a result of MP I and MP II. 4 CT 810.

16) ("Both the Former [SDCERS] Board and the City Council adopted MP 1."). Thus, SDCERS was responsible for the benefit increases at issue, and regardless of the *Gleason* settlement's partial, after-the-fact resolution of underfunding, the City is entitled to proceed to a determination of the merits as to the unlawful creation of that debt.

2. An Actual, Justiciable Controversy Exists Between the City and SDCERS Over Whether a Violation of the Debt Limit Laws Occurred

The trial court committed yet another egregious error by ruling that "the City's claim in the 5ACC that SDCERS violated Constitutional Article XVI, section 18 and/or Charter section 99 does not give rise to a justiciable controversy since the real parties are not before the court or subject to the allegations in the causes of action." 12 CT 3142:19-22. That ruling fails to appreciate the nature of the relief the City seeks—declaratory—and ignores the very real, live controversy between the City and SDCERS over whether the creation of benefits under MP I and MP II violated the debt limit laws.

Declaratory relief is an equitable remedy that is available to an interested party in a case "of actual controversy relating to the legal rights and duties of the respective parties . . . ." *East Bay Mun. Utility Dist. v. Dep't of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1121. Where, as here, the parties dispute whether a public entity has violated the law, that dispute ***alone*** sustains an action for declaratory relief. *See California Alliance for Utilities Safety and Educ. v. City of San Diego* (1997) 56 Cal.App.4th 1024. In *California Alliance*, the parties disputed whether the City Council had violated the city charter and the Brown Act, Cal. Gov't Code § 5490, by holding closed sessions to discuss the electric company's duty to lay power lines underground.

Id. at 1029-30. The Court rejected the City's argument that there was no controversy, explaining that the parties' antithetical positions over whether the City had complied with the relevant laws was a controversy, and "[o]n that basis alone, plaintiffs are entitled to declaratory relief resolving the controversy." *Id.* at 1030. *See also Alameda County Land Use Ass'n v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723 (holding that a challenge to the validity of an MOU states an actual controversy when the parties "dispute whether a public entity has engaged in conduct . . . in violation of applicable law.")

Just as in *California Alliance* and *Alameda County Land Use Association*, the two parties here take opposite positions over whether a violation of the applicable law has occurred. The City on the one hand, and SDCERS and the Unions, on the other hand, fundamentally disagree over whether the creation of pension benefits under MP I and MP II violated the debt limit laws. *See, e.g.*, 5 CT 1055:21-1058:18 (arguing that "MP I, MP II, and the pension benefits enacted 'in conjunction with' them did not violate the debt limit laws."); 5 CT 1242:1-1249:8. That dispute constitutes an actual controversy sufficient for declaratory relief.

Because there is a justiciable controversy, it is irrelevant, contrary to the trial court's view, ***who*** violated the debt limit laws (SDCERS or other City officials). *See* 12 CT 3141:14-3142:18. A declaratory action merely determines the parties' "rights and duties . . ., including a determination of any question of construction or validity arising under the instrument or contract." Cal. Code Civ. Proc. § 1060; *see also East Bay Mun. Utility Dist, supra*, 43 Cal.App.4th at 1121. Here, declaratory relief will determine

whether SDCERS has a duty to continue paying benefits using City funds to do so (as it and the Unions contend), or whether the City has the right to prevent SDCERS from continuing to pay them. A justiciable controversy exists and it is immaterial whether SDCERS, or some other entity, is the wrongdoer.

The trial court further erred by turning a blind eye to the public interest in the issues. Although the public interest is not dispositive in determining the justiciability of a claim, it should be considered and weighed in favor of resolving the issue. *See, e.g., California Alliance for Utility Safety and Educ., supra*, 56 Cal.App.4th at 1030 (evaluating justiciability and stating that "[a]lthough the public importance of an issue is not controlling, we must recognize . . . the public interest in resolving this controversy is substantial"). The trial court's refusal to adjudicate the debt limit law question, based on its erroneous understanding of justiciability doctrines, deprives the public of any legal certainty regarding the validity of the enormously expensive and illegally procured benefits.

3. SDCERS Is Part of the City And the Debt Limit Laws Apply to It

The court also suggested that SDCERS is not a proper party because SDCERS may not be a "city" within the meaning of California Constitution, Article XVI, § 18 and City Charter, Article VII, § 99. 12 CT 3141:2-14. While the court's opinion rightly recognizes that SDCERS is bound by the City Charter and California Constitution, 12 CT 3140:24-25 ("the City Charter and California Constitution define the duties and responsibilities of SDCERS"), the court nonetheless found that because SDCERS "is a

public retirement system . . . and is not the city of San Diego, these sections do not apply to SDCERS." 12 CT 3141:2-10 (citations omitted).

However, SDCERS ***is*** part of the City. SDCERS is a creature of City law. S.D. City Charter, Art. IX, §§ 141, 144. SDCERS Board members are City officials. *Id.* § 144. And, it is incontrovertible under the City Charter that SDCERS is a ***department of the City***, and therefore part of the City. *See* S.D. Muni. Code § 22.180(b) (City departments include the City Retirement Board). Indeed, the trial court previously has ruled that SDCERS is a department of the City. 3 CT 552. Accordingly, the court's finding that the debt limit laws do not apply to SDCERS because SDCERS is not the "city" is erroneous.

In any event, the Court misses the mark because the issue is not whether SDCERS qualifies as the "city," but rather whether SDCERS is causing the City to incur debts and liabilities in excess of its annual revenue, and thereby causing the City to violate the debt limit laws. Because the answer is "yes," the City must bring this action against SDCERS to stop further illegal payments. Both the California Constitution and the San Diego Charter prohibit cities from incurring indebtedness or liabilities "***in any manner***" that exceeds income or revenue for that year. Cal. Const., Art. XVI, § 18; Charter, Art. VII, § 99. Because SDCERS is taking the position that the MP I and MP II benefits are lawful and must be paid, the City is continuing to incur liabilities in excess of revenue, and the only way the City can comply with the law is through this lawsuit to stop Board distribution of unlawfully-created benefits. The debt limit laws contain no limitation as to who may be sued to accomplish their enforcement.

Alternatively, the court suggests that if SDCERS is part of the City "then the City is suing itself for relief" and this "does not constitute an appropriate justiciable controversy under the unique facts and circumstances of this case." 12 CT 3141:12-14. The court cites no authority, however, for the proposition that one agency of a public entity may not sue another governmental agency, and the unsupported holding that such a controversy is not "justiciable" is erroneous as a matter of law. *See City Council v. McKinley* (1978) 80 Cal.App.3d 204, 207 (City Council petitioned for a writ of mandamus against the city manager and the city auditor and comptroller); *see also* Cal. Code Civ. Proc. § 1021.5 (permitting an award of attorney fees to a prevailing public entity in actions involving "enforcement by one public entity against another public entity . . ."). Indeed, the court already has held in this case that although SDCERS is part of the City, it is an entity that is subject to suit by the City, 3 CT 551, 552, 555, a conclusion manifest in the court's substantive rulings in the remainder of its Decision.

SDCERS has stipulated that it will be bound by the judgment of the court in this case. Accordingly, there is a justiciable controversy between the City and SDCERS as to whether the debt limit laws have been violated.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACTION COULD NOT PROCEED UNLESS NECESSARY PARTIES WERE JOINED

The Court erred when it ruled that the City was required to add individuals ***who were not parties to the underlying agreements***, before the case could proceed. This is especially so when three City Unions, ***who were parties to MP I and MP II***, voluntarily intervened into this action, and when the issues in dispute are alleged violations of public

laws prohibiting government officials from exceeding debt limits and participating in contracts in which they had a public interest.

To determine whether a party is necessary to case, the court evaluates whether (1) complete relief is possible among the existing parties, and (2) the absent party has a legally protected interest in the outcome of the litigation. After determining that a party is necessary, the court examines whether that party can be joined and, if not, whether that party is indispensable to the action, rendering dismissal of the case necessary. Cal. Code Civ. Proc. § 389; *see generally Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 808-09.

1. Complete Relief Can Be Afforded Among the Parties

The City seeks to set aside contracts and legislative actions which were adopted in violation of multiple laws. If City officials violated the applicable law, the actions are void and the mandatory remedy requires that the official actions be set aside. ***That result does not vary based upon the identity or interest of any absent parties: The law requires invalidation of the official action irrespective of the individual impact that would follow***. Thus, under the laws cited by the City, a single party would be entitled to the relief sought if it be shown that the conflict of interest laws or debt limit laws were violated. *See supra* at 29-30.

In addition, because the actual parties to the contracts—the Unions and SDCERS—are parties to the case, all necessary parties are joined; third party beneficiaries to contracts are not necessary parties to actions implicating those contracts. *See, e.g., Ragan v. Sirigo* (1958) 160 Cal.App.2d 832, 834 ("If Murphy were a third party

beneficiary under the contract, he still would not be a necessary party to the action."). By statute, a person who has entered into a contract for the benefit of another may sue ***without joining as a party the person for whom the action is prosecuted.*** Cal. Code Civ. Proc. § 369(a)(3).

In this case, the Unions' complaints seek a judicial determination that SDCERS may legally continue paying benefits. *See* 1 CT 212:11-14; 1 CT 174:21-23, 26-28; 1 CT 189:11-12; 1 CT 141:24-26. Because the Unions, ***who are the parties to the agreements (MOUs) giving rise to the contested benefits***, are prosecuting claims that benefit not only themselves, but also the absent beneficiaries, those beneficiaries need not be joined. *See* Cal. Code Civ. Proc. § 369(a)(3); *see also Chase v. Van Camp Sea Food Co.* (1930) 109 Cal.App. 38, 46 (where contract for fishing and cleaning fish was in father's name, father could maintain action alone, even though contract would benefit son); *accord In re Marriage of Smith & Maescher* (1993) 21 Cal.App.4th 100, 106 (third party beneficiaries are not indispensable parties to a promisee's action to enforce a contract) (applying Massachusetts law).

Moreover, in cases of public interest such as this, traditional rules of party joinder do not apply and a case may proceed even in the absence of a party to the contract (much less a third party beneficiary as here). *See People ex rel. Lungren v. Cmty. Redevelopment Agency* (1997) 56 Cal.App.4th 868, 882-83. In *People ex rel. Lungren*, the challenge involved a particular developer (a sovereign Indian tribe), but the challenge also involved a broader claim that the government agency exceeded its authority in entering into the agreement with the developer. The court found that if the law did not

permit a court to hear the challenge to the actions of the government agency because of the inability to join the Indian tribe in the lawsuit, the effect would be to immunize any local entity from court review of transfers of publicly-owned real property to Indian tribes. *Id.* at 881. The court found that even if a party to a contract could not be joined in an action, the public interest in obtaining review of public agency actions negates the requirements of Section 389. *Id.* at 882. A judgment rendered in the contracting party's absence would not to be prejudicial to him or to those already parties. *Ibid.*

In addition, when a critical mass of the interested parties is present and vigorously defending the case, it is not necessary to require all parties to be present. Rather, the parties involved have an interest sufficient to protect the interests not joined. This is especially true when the issues concern whether or not public officials violated their public duties. *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1096; *People ex rel. Lungren v. Community Redevelopment Agency, supra*, 56 Cal.App.4th at 877-78.

Because the remedy sought here is one that confines the relief to the broad question of the unlawfulness of the official action, the trial court erred in refusing to decide the conflict of interest and debt limit law issues—arguably the most portentous legal questions in San Diego's history. It is wholly illogical to rule that beneficiaries are necessary parties in a Section 1090 case when they are not accused of violating 1090. There is no reason to require the impractical joinder of thousand upon thousands of individuals whose absence does not prevent the court from adjudicating the issues.

2. Absent Parties and Existing Parties Are Not Harmed by Proceeding

Section 389 next requires that a person be joined if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." These inquiries also favor resolution with the extant parties.

a. The Unions and Other Parties Represent the Absent Parties and Therefore the Absent Parties' Interests are Protected

The ability of the absent parties to protect their interests is not impaired or impeded by this action because they are well represented by multiple existing parties. Parties are not necessary under Section 389(a) when they already are fairly represented by existing parties to the action. *See Citizens Ass'n for Sensible Dev. of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 161; *see also Deltakeeper*, *supra*, 94 Cal.App.4th at 1102 (a nonjoined party's ability to protect its interest is not impaired or impeded as required by Section 389(a) when a joined party has the same interest in the litigation). Here, the absent parties—pension beneficiaries—are well represented by the existing parties—including the Unions, SDCERS and the *Abdelnour* Plaintiffs.[6]

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[6] The trial court found that SDCERS, despite its role as trustee for the pension system and fiduciary for the beneficiaries, did not represent the beneficiaries because of its tactical decision to sit out the Phase I trial. 12 CT 3134:7-12. However, SDCERS remains a party to this case and has its own compulsory cross-complaint. 4 CT 810. There is no suggestion that SDCERS would not participate in Phase III of the trial

In particular, given principles of representational standing, the Unions have standing to sue and to obtain binding determinations on behalf of their individual members, and therefore the individual employees and beneficiaries do not need to be parties to the litigation. *See Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Brock* (1986) 477 U.S. 274, 287-90 (unions had standing to litigate the legality of legislation impacting union members, even without the joinder of the members in the lawsuit because the lawsuit turned upon a question of statutory interpretation).

The same rule governs under California law. In *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 284, for example, the court held that the union could seek declaratory and injunctive relief for discrimination against individual union members. The court wrote:

> [U]nions such as plaintiff may be organized for the sole purpose of representing their members. An action at law on behalf of such members is ***one form of such representation*** . . . . [Plaintiff union's] members are all employees of the fire department and as such have a clear beneficial interest in the subject matter of the complaint. ***Its interest is joint with theirs.***

Id. at 284 (emphasis added).

Indeed, the unions represent ***all*** the employees and beneficiaries. *See* R. Weil, *et al., California Practice Guide: Civil Procedure Before Trial* § 14:242 (The Rutter Group 2006) (for representative actions, labor unions are treated "specially"; they have "standing to sue on behalf of their members individually, and even on behalf of

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relating to the actual existence of a Section 1090 violation. Likewise, the 194 *Abdelnour* Plaintiffs represent individual non-union employees and retirees. 12 CT 3135:3-10.

nonmembers") (citing *Anaheim Elementary Educ. Ass'n v. Bd. of Educ.* (1986) 179 Cal.App.3d 1153, 1159) (emphasis in original).[7]

In such cases, ***representational standing is the equivalent of class action representation***, and class action procedure, including notice to individual class members, is superfluous. *See Glendale City Employees' Ass'n v. City of Glendale* (1975) 15 Cal.3d 328, 341 (in case under Meyers-Milias-Brown Act ("MMBA"), because plaintiff association could sue in its own name on behalf of members, class action format added nothing to rights or liabilities of parties, and "***the issue of notice to the members of the class is immaterial***") (emphasis added).

Nor does it matter that the subject of the litigation is the union members' claim to benefits or other entitlements of employment governed by the MMBA. *See generally* Cal. Gov't Code § 3504 ("the scope of [the unions'] representation shall include all matters related to employment conditions and employer-employee relations, including but not limited to wages, hours, and other terms and conditions of employment . . . ."). In *California School Employees Association v. Willits Unified School District* (1966) 243 Cal.App.2d 776, 780, the union's standing to sue on behalf of its members under the MMBA was challenged on the grounds that individual actions by the members were

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[7] *Compare* 12 CT 3134:20-22 ("The evidence and law established the unions represent only current employees . . . ."). Under the court's reasoning, while the Unions were capable of representing the employees and all system beneficiaries in approving MP I and MP II, *see* 12 CT 3125:1-13; 12 CT 3126:14-23; 12 CT 3137:17-20, and while the Unions actively have intervened to obtain a declaration of the ***legality*** of those agreements on behalf of all beneficiaries, 12 CT 3113:22-26, 12 CT 3137:12-19, *see also, e.g.*, Ex. 2190 (MEA's Complaint in Intervention at 12), they are incapable of representing the same interests if the court were to rule that the agreements are illegal.

required because the individuals' interests were personal, and the evidence relating to the individuals' salary and damages would vary. Citing the public interest in the resolution of important statutory issues, the court rejected the contention that the union was an insufficient representative of the individual interests of its members in their perquisites of employment:

> [A]n organization which qualifies under [the MMBA has] standing to sue in its own name to enforce the employment rights of its members . . . . [T]he question [presented] is not only of common interest. . . , but it is of public interest, for the issues relate to interpretation of important statutes . . . [¶] ***Equally lacking in substance is the district's contention that individual actions should have been brought because the evidence relating to [the members] was different. It was different as to amounts of salary and perhaps other details, but not as to substantial issues, particularly when interpretation of the same statutes was essential to both cases.***

Id. (emphasis added). Having found jurisdiction to adjudicate the dispute with the union as the sole plaintiff, the court then proceeded to determine that the "award of back salary to one employee and damages for diminished income to the other cannot be sustained," *id.* at 787, making clear that jurisdiction lay to rule adversely to the employee union members in an action brought on their behalf by the union itself.

Particularly where the remedy contemplated by the law is declaratory relief and mandamus, the individual union members need not be joined. *See Bhd. of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515. In that case, the court followed the United States Supreme Court opinion in *Brock*, and held that the union had standing to litigate whether its employees were eligible for benefits, and that the employees need not be joined as parties to the lawsuit. *Id.* at 1521-24.

Noting that state law on standing is "consistent with federal law," *id.* at 1521 n.3, the court wrote:

> Here, as in *Brock*, the mandate proceeding raises a pure question of law, i.e. whether the Board properly interpreted section 1262 in denying its benefits to the union member claimants. Although the Board may have to determine each claimant's benefits, the unions may litigate this case ***without the participation of its members*** and still insure that the remedy, if granted, will inure to the benefit of those union members who have been injured.

Id. at 1523 (emphasis added). *See generally* 8 B.E. Witkin, California Procedure, Writs § 77 (4th ed. 1997) (participation of individual union members not necessary for issuance of writ of mandamus).

Phillips v. State Personnel Board (1986) 184 Cal.App.3d 651, 660, disapproved on other grounds, *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123 n.8, which was cited by the trial court, CT 3137:18-19, for the proposition that unions "cannot ***bargain*** away nor waive employees' individual constitutional rights," (emphasis added), is not on point. Here, the unions are representing employees' interests in ***litigation***, which is precisely their function, and which binds the employees to adverse decisions affecting their common interests, as discussed. *Philips* does not establish that a union cannot represent its members in a lawsuit involving pension benefits.

Nor does the trial court's lengthy discussion of agency theory overcome principles of representational standing. *See* 12 CT 3137:27-3138:17. The cases cited do not even consistently involve unions, but rather discuss whether an association's members can be liable—this, even though the City does not seek to hold the individual employees liable. *See Barr v. United Methodist Church* (1979) 90 Cal.App.3d 259; *Fazzi v. Peters* (1968)

68 Cal.2d 590 (not discussing representational standing, but construing specific statute, Cal. Code Civ. Proc. § 388, and holding that individual property of a partner cannot be bound by judgment unless partner is joined). The two cited cases involving unions merely note, in dicta, the general proposition that union actions are valid only as to common or group interests, and individuals do not incur obligations by virtue of joining associations. *See Marshall v. Int'l Longshoremen's & Warehousemen's Union* (1962) 57 Cal.2d 781, 787; *DeMille v. Am. Fed'n of Radio Artists* (1947) 31 Cal.2d 139, 149. These matters are off point on the question whether an issue of common interest to all union members can definitively be resolved in litigation in which the members are represented by the union under representational standing principles.

The notion that the City seeks to set aside some benefits but not others, making union members adverse to one another, 12 CT 3139:1-4, is factually incorrect as to the City (the City seeks to set aside all MP I and MP II benefits), 4 CT 945; 4 CT 958 (¶ 67); 4 CT 959 (¶ 70), and also an erroneous statement of the Unions' position, which is uniformly to support all benefits for all beneficiaries, *see, e.g.*, 1 CT 174:26-28 (MEA's Complaint in Intervention) ("MEA . . . opposes any claim that pension benefits heretofore adopted by the City Council . . .are 'illegal or void'. . . ."); 1 CT 185:14-15 (requesting declaration that "all pension benefit improvements . . . be declared lawful"); 1 CT 205, 214:15-18 (*Abdelnour* Plaintiffs' First Amended Complaint for Declaratory Relief) (seeking judicial determination that "SDCERS may properly and legally pay all City Retirement Benefits"); 1 CT 139, 141:24-26 (Local 127's Complaint in Intervention)

(seeking declaration that SDCERS may "properly and legally pay all City Retirement benefits").

Asserting their desire for representational standing, the Unions moved to intervene in this case, specifically alleging that they represent the interests of their individual members. *See* Ex. 2188.2-3, ¶ 3 ("Local 145 is the certified bargaining representative for all employees of the City of San Diego in the Fire Fighter Unit . . . . Local 145 has a fundamental interest in preserving the City Retirement Benefits being challenged by Aguirre because it represents employees who have worked and are working for the City with the expectation of receiving those benefits . . . . Local 145 represents both safety members and general members of SDCERS whose vested retirement benefits have been challenged by Aguirre and are at issue in the Action").[8]

The Unions' Complaints specifically seek a determination that the benefits awarded under MP I and MP II are lawful. *See, e.g.,* Ex. 2188.3 (¶ 6) ("The Contested Retirement Benefits were not enacted in violation of Government Code Section 1090").[9]

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[8] *See also* 1 CT 139 (¶ 3a) (Local 127's Complaint in Intervention) ("Local 127 is the exclusive bargaining representative for approximately 2200 active employees . . . . Local 127 has the exclusive right and duty to represent all employees in the Unit regarding matters within the scope of representation, including retirement benefits"); 1 CT 99 (¶ 7); 1 CT 100 (¶ 9) (Declaration of Ronald L. Saathoff in Support of Firefighters, Local 145, *Ex Parte* Application to Intervene, at 8 (¶¶ 7, 9) (Local 145 "represents the employees who have worked for the City with the expectation of receiving those benefits. [¶] Local 145 is the only entity authorized by law to represent the employment interests of firefighters"); Ex. 2190 at ¶ 1(MEA's Complaint in Intervention) ("MEA is a recognized employee organization within the meaning of the state's [MMBA].").

[9] *See also* 1 CT 94:17-24 (*Ex Parte* Application by San Diego City Firefighters, Local 145, for Leave to Intervene at 2) ("Local 145 has a fundamental interest in

The Court granted the motions to intervene, and the Unions (as well as the *Abdelnour* Plaintiffs) have been full participants and vigorous advocates for their members' interests in establishing the legality of the benefits.

The individual beneficiaries—***none of whom have sought to intervene in this case***—are well aware of the Union's representation of their interests. For example, Firefighter John Thompson testified in response to the question of whether the 1300 individual members of the Firefighters Union are in "some way a party to this case," "I guess we all are as far as benefits." 10 RT 1036:7-12. Thompson testified that counsel for the Union was protecting the individual members interests in this litigation. 11 RT 1090:4-12.

Similarly, former MEA President Judith Italiano testified that the MEA members "are relying on us protecting the language that we fought for, that talks about their retirement benefits." 19 RT 3066:18-27. The MEA has told its members about the basic nature of the litigation, 19 RT 3062:25-27, how the case is proceeding before the court, 19 RT 3062:28-3063:4, that "our attorney is representing the organization's agreement with the City about our retirement," 19 RT 3063:21-26, and that the Union is looking out for their interest in this litigation. 19 RT 3063:27-3064:8.[10]

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preserving the City Retirement Benefits being challenged by Aguirre because it ***represents the employees*** . . . . If Aguirre is successful, members of Local 145 will be deprived of retirement benefits . . . .") (emphasis added); 1 CT 139 (Local 127's Complaint in Intervention) (prayer for relief that the Contested Benefits are "lawful and enforceable in all respects").

[10] *See also* 19 RT 3063:27-3064:3 ("Q. Have you told the [union] members that. . . the union is looking out after their interest in this litigation? A. As it relates to what we

With their participation guaranteed, the Unions and their members cannot have it both ways—claiming standing to establish the ***validity*** of the employees' benefits under MP I and MP II, but not the converse—to suffer a determination of the legal ***invalidity*** of such benefits under conflict of interest law or debt limit laws. Rather, not only do the Unions have the standing to litigate on behalf of their employee members without joining such members in the lawsuit, but adverse as well as favorable decisions may issue from such litigation. *See, e.g., San Bernardino Public Employees Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223 (in litigation brought by union relating to employee benefits brought under MMBA, court adjudicated rights of employees; appellate court held that trial court erred in holding that employees' rights in certain benefits were vested because public employees have no vested right in any particular measure of benefits); *accord In re Retirement Cases* (2003) 110 Cal.App.4th 426, 469-72 (in consolidated action in which numerous cases had union as sole plaintiff, court determined that retirement boards had discretion to collect arrearages in contributions from plan members to fund contribution shortfall arising from board's mistaken interpretation of law); *Cal. Sch. Employees Ass'n v. Sequoia Union High Sch. Dist.* (1969) 272 Cal.App.2d 98, 103-104, 112 (association had standing to sue in litigation regarding employees' rights; court

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have bargained in our MOU, yes."). *See also* 1 CT 117:1-9 (Declaration of Edward G. Lehman) ("The employees represented by Local 127 are acutely aware of the current controversy concerning the lawfulness of the current SDCERS benefit structure . . . ."); 19 RT 3062-66 (MEA uses electronic mail and written communications to keep its members up to date on the status of this litigation).

ruled adversely to affected employees); *California Sch. Employees Ass'n v. Willits Unified Sch. Dist.*, *supra*, 243 Cal.App.2d at 780, 788.[11]

Given that the Unions and other parties adequately represent the interests of the absent beneficiaries, it was erroneous to conclude that the thousands of beneficiaries are each necessary parties. The court's authorities all relate to situations where the absent parties were not represented by the parties to the case.[12]

Because complete relief (a declaration of invalidity of official action) can be afforded among those who are parties, because that declaration is in the public interest, because the absent parties' interests are fully represented so that their interests will not be impaired or impeded, and because those already parties are not subject to inconsistent

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[11] *Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, cited by the court, does not overcome the rules on representational standing, a doctrine *Silver* did not consider. The facts in *Silver* were completely different—in *Silver*, the ***unions*** (petitioners) sought to recoup individual payments made by defendant/respondent governmental agency to certain employees from whom the governmental agency would have to recoup the payments if relief were granted. *Id.* at 346, 348. *Silver* merely held that the trial court did not abuse its discretion in weighing several considerations (not present here) and concluding that employees were indispensable parties. *Id.* at 349-50. Here, the City seeks a declaration as to the invalidity of governmental actions—not a remedy against any individual employee or retiree for a return of monies paid.

[12] 12 CT 3137:1-6. In *Tuller v. Superior Court* (1932) 215 Cal. 352, 355, *Salazar v. Eastin* (1995) 9 Cal.4th 836, 860, and *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1081, none of the existing parties to the lawsuit represented the absent parties. *Tuller*, *supra*, 215 Cal. at 355 (deciding whether both mother and father were necessary in action by child for support); *Korean Philadelphia*, *supra*, 77 Cal.App.4th at 1083 (holding that no party had standing because only corporate shareholders, officers and directors have standing, and parties all were corporate outsiders).

obligations,[13] the trial court erred in finding that absent parties are "necessary" within the meaning of Section 389(a). Upon finding that absent parties were necessary, the court then concluded that their joinder was practicable, and the court therefore declined to consider altogether whether it should exercise discretion to proceed in their absence under Section 389(b). 12 CT 3139:10-12 (court would not consider Section 389(b) because "the affected individuals are known and subject to service of process"). This was an abuse of discretion.

b. Even If There Are Necessary Parties, These Parties Are Not Indispensable

Even if a determination of necessity under Section 389(a) is made, the court has broad discretion to maintain the action. *E.g.*, *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 44. Section 389(b) states, "[i]f a person described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it . . . ." Courts "should, in dealing with 'necessary' and 'indispensable' parties, be careful to avoid converting a discretionary power or a rule of fairness in procedure into an arbitrary and

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[13] Not only can complete relief be afforded among those already parties through a declaration that MP I and MP II are void for violation of conflict of interest and debt limit laws, but that declaration would eliminate the prospect that the existing parties would be subject to inconsistent obligations. Upon determination that MP I and MP II are void, the City can assert that binding adjudication under collateral estoppel in subsequent litigation. Moreover, both SDCERS and the City have agreed to assume the risk of inconsistent adjudications, if any. Hence, the court's summary conclusion, without analysis or authority, that proceeding would "leave SDCERS and the City subject to the substantial risk of incurring multiple or inconsistent obligations. . . ," 12 CT 3136:22-23, is without foundation.

burdensome requirement which may thwart rather than accomplish justice." *Bank of Cal. Nat'l Ass'n v. Super. Ct.* (1940) 16 Cal.2d 516, 521.

Parties should be joined "unless it is impossible to find them, ***or impracticable to bring them in***. But it is a matter of discretion whether or not to proceed without them." *Leonard Corp. v. City of San Diego* (1962) 210 Cal.App.2d 547, 551 (emphasis added); *see also People ex rel. Lungren supra*, 56 Cal.App.4th at 875-76 ("It is for discretionary and equitable reasons, not for any want of jurisdiction, that the court may decline to proceed without the absent party.") (quoting *Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 368).

Here, equity demands that the case proceed without the mandated joinder of thousands of individual beneficiaries so that finality of this important public question may be achieved. Numerous public officials—including the City's Mayor—have urged a final judicial determination regarding the legal issues raised by MP I and MP II. Mayor Jerry Sanders submitted a declaration to the court stating that the lingering "cloud" of uncertainty over the City's finances, created by the issues related to the pension system, has limited the City's ability to obtain financing necessary to fund important public works projects. Augmentation to CT 2, filed Apr. 17, 2008 (Declaration of Mayor Jerry Sanders, June 12, 2006, at ¶ 2). "[A] major impediment" to the Mayor's stated objectives is the "continuing uncertainty as to the legality of certain benefit increases created under. . . [MP I and MP II] . . . ." *Id.* (Declaration of Mayor Jerry Sanders, June 12, 2006, at ¶ 3).

The other parties, too, have committed enormous resources to this lawsuit, and need and desire certainty, as evidenced by the allegations of their pleadings in this case, asserting that the dispute is justiciable, and seeking declaratory relief on the benefit legality issue.[14]

Just as all taxpayers do not need to be before the Court, all interested beneficiaries need not be parties. The impracticality of joining thousands of individuals—here, every employee, retiree, and beneficiary of the City retirement system—disfavors a determination that they are indispensable to the action. Rather, the "delay and expense" of joining so many (nearly 20,000) individuals is "oppressive and burdensome" and is therefore not required. *See Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1026-27; *see also Deltakeeper*, *supra*, 94 Cal.App.4th at 1106-08 (in an action to set aside a contract, all parties to the contract are not indispensable parties; "the fact the action may affect the interests of the nonjoined parties in the underlying contract does not dictate the conclusion that they are indispensable parties.").

In *Hebbard,* for instance, the court declined to require joinder of the beneficiaries in a trust fund suit "where the beneficiaries are very numerous, so that the delay and expense of bringing them in becomes oppressive and burdensome." 28 Cal.App.3d at

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[14] *See, e.g.,* 1 CT 73:16-17 (*Ex Parte* Application of MEA for Leave to Intervene) ("MEA has a duty to act expeditiously and by all available means to eliminate the enormous uncertainty and anxiety that has been created. . . ."); Ex. 2187.10 ¶ 18 (*Abdelnour* Plaintiffs' First Amended Complaint) ("a judicial determination of the legality of the Contested Benefits is necessary to resolve the present controversy. . . ."); Ex. 2187.11 ¶ 24 ("[A] judicial determination is necessary and appropriate at this time so that the parties can ascertain their respective rights and duties").

1027; *see also People ex rel. Lungren, supra*, 56 Cal.App.4th at 882. While the class action device theoretically is available, as discussed, such procedure is superfluous as to employees and beneficiaries when the unions are parties, *Glendale City Employees' Ass'n v. City of Glendale*, 15 Cal.3d at 341, and particularly because the absent parties' interests are well represented, participation of each and every potentially interested and already represented individual in the context of this public interest litigation is not required. *People ex rel. Lungren, supra*, 56 Cal.App.4th at 882.

The trial court attempted to circumvent the impracticability of joining so many individuals by pointing to the narrowed scope of the lawsuit after its rulings that the *Corbett* and *Gleason* settlements bar the City's claims as to most of the pension beneficiaries. 12 CT 3118:9-19. Because those rulings were erroneous as a matter of law, as discussed below, the Court's finding that joinder is practicable, predicated upon those erroneous limitations of the scope of the case, is an abuse of discretion. Once the court's erroneous *Corbett* and *Gleason* "bars" are stripped away, there are 17,638 SDCERS beneficiaries who would have to be individually named, served and joined to the lawsuit. 12 CT 3134:15. Such joinder is impractical and the court abused its discretion in failing to consider whether such parties were indispensable under Section 389(b). As discussed, given the considerations weighing in favor of resolution—especially the public interest—they are not.

C. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE *CORBETT* SETTLEMENT BARS LITIGATION AS TO THE LEGALITY OF MP I BENEFITS

The trial court found that the City's claims as to MP I are barred by a settlement reached in *Corbett v. City Employees' Retirement System*, San Diego Superior Court Case No. GIC 722449, ***a case which had nothing to do with either MP I or conflict of interest or debt limit laws.*** Instead, *Corbett* dealt only with the narrow question of whether City employees were entitled to have certain monies included in the base compensation component of their retirement pay under the Supreme Court decision in *Ventura County Deputy Sheriffs' Association v. Board of Retirement* (1997) 16 Cal.4th 483. Ex. 920.

The City settled *Corbett* in 2000. Ex. 930. As for City employees who terminated employment on or before July 1, 2000, in lieu of the *Ventura* amount, the settlement agreement provides for an increase in their "retirement benefit payment" of a simple 7% both prospectively and retroactively. As for those actively employed by the City on July 1, 2000, the agreement provided for increases in the Retirement Calculation Factor for Safety Members (from 2.5% to 3.0%) and for General Members (from 2.0% to 2.25%).

Despite the complete absence of any issue in *Corbett* regarding MP I—much less a contention that MP I is void under state or local good government laws—the trial court erroneously wove together a patchwork of *res judicata* and ratification principles, and held that the 2000 *Corbett* judgment bars the City from challenging the legality of MP I.[15]

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[15] *Corbett* pre-dated MP II and, therefore, no party contended that *Corbett* affected MP II.

1. Preclusive Principles Do Not Support a Finding that the City's Conflict Of Interest Claim Is Barred by the *Corbett* Judgment

In evaluating the error, it is important to distinguish between claim preclusion (or bar/merger) and issue preclusion (or collateral estoppel). Claim preclusion bars a party or its privy from suing on the ***same cause of action*** in a subsequent case after final judgment in an earlier case. *E.g.*, *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1563 ("In its primary aspect the doctrine of *res judicata* [or 'claim preclusion'] operates as a bar to the maintenance of a second suit between the same parties on the same cause of action."); *McNulty v. Copp* (1954) 125 Cal.App.2d 697, 708 (a judgment in one lawsuit is *res judicata* only on the same cause of action in a second lawsuit; matters not at issue are not *res judicata* in subsequent litigation). Because the party had its day in court in the first case as to the entire cause of action (including all matters raised or which could have been raised), it is barred in subsequent cases from asserting not only all issues that were actually litigated, but those that could have been litigated arising out of that cause of action or primary right. *E.g.*, *Lincoln Property Co., N.C., Inc. v. Travelers Indem. Co.* (2006) 137 Cal.App.4th 905, 912-13 ("Under this aspect of *res judicata*, the prior final judgment on the merits not only settles issues that were actually litigated but also every issue that might have been raised and litigated in the first action.").

By comparison, issue preclusion or collateral estoppel deals with a subsequent case involving the same issue, even when brought on a different cause of action. *E.g.*, *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, 708

("[Collateral estoppel] applies regardless of whether the issue was brought on the same or on a different cause of action."). When a party to a prior lawsuit is involved in subsequent litigation on a different cause of action, under certain circumstances, that party may assert offensively or defensively that a particular issue has been litigated in an earlier case and therefore cannot be relitigated in the present case. *See Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322, 332-333; *Sutton v. Golden Gate Bridge, Highway & Transp. Dist.* (1998) 68 Cal.App.4th 1149, 1157. To invoke collateral estoppel, a party must show: (1) identity of issues; (2) identity of parties; and (3) a final judgment. *Lucido v. Super. Ct.* (1990) 51 Cal.3d 335, 341. As to the first element, the same issue must actually and necessarily have been litigated in the prior case to be binding in the second case. *Lucido*, *supra*, 51 Cal. 3d at 341. The "should have been raised" concept of claim preclusion has no place in collateral estoppel analysis and only issues actually litigated are subject to estoppel in the subsequent action. 7 B.E. Witkin, California Procedure, Judgment, § 257 (3d ed. 1985) ("[A] former judgment is not a collateral estoppel on *issues which might have been raised but were not. . .*") (italics in original).

The trial court's *Corbett* analysis misapprehends these basic principles. The court held that the City is "estopped" from litigating conflict of interest and debt limit law violations and challenging the void agreement (MP I) because the City settled and judgment was entered in an earlier case which had ***nothing to do with either MP I or conflict of interest or debt limit laws***. Indeed, the trial court's decision makes this point clear:

> On July 16, 1998, the *Corbett* class action lawsuit against the SDCERS Board was filed . . . . The City appeared in the case as a real party in interest. The litigation alleged SDCERS miscalculated the "final compensation" of City workers by excluding from the calculation additional items of compensation such as uniform allowances, vacation allotments, overtime and other benefits the Court had required Ventura County to include in its calculation of "final compensation" for Deputy sheriffs [in *Ventura*]. ***The Corbett case was based on the exclusion of these Ventura County benefits from "final compensation" calculations at SDCERS and did not involve allegations of violation of Government Code § 1090 or a challenge to benefits enacted in 1997***.

12 CT 3122:9-20 (emphasis added).

Thus, *Corbett* did ***not*** involve the same primary right or cause of action as the City's claim in this case. Hence, ***principles of claim preclusion and "what should have been litigated" have no bearing.*** Likewise, issue preclusion or collateral estoppel (which, as noted, would bind the City only on matters actually and necessarily litigated in the *Corbett* case) is not applicable: As the court's decision confirms, Section 1090 and MP I benefits were ***not*** actually and necessarily litigated in *Corbett.* Hence, as a matter of law, neither claim preclusion nor issue preclusion arising from the *Corbett* judgment could preclude the City from litigating the validity of benefits awarded in exchange for underfunding in MP I in this case.

Despite this seemingly straightforward conclusion that a judgment in an earlier case that did not involve a cause of action for conflict of interest or debt limit law violations (and in which such issues were not litigated) cannot preclude such claims raised in a subsequent lawsuit, the court nonetheless found the *Corbett* judgment barred the City from challenging MP I on those grounds based upon an amalgam of *res judicata*

principles. *See* 12 CT 3116:2-4 (judgment is "binding on the City"); 12 CT 3116:14-17 (*Corbett* judgment is "binding on all parties to it").

First, in language suggesting claim preclusion, the court found that "any claims based on pre-*Corbett* [MP I] benefits have been ***merged*** in the *Corbett* judgment." 12 CT 3132:26-28 (emphasis added). "The benefits in effect at the time of, and underlying, the *Corbett* judgment, including benefits funded under MP I, cannot now be set aside because doing so would invalidate the *Corbett* judgment." 12 CT 3133:1-3. The Court does not explain—nor can it—how the claim preclusion concept of bar/merger finds its way into an analysis of a subsequent lawsuit admittedly brought on an entirely ***different cause of action*** than pleaded in *Corbett*.[16]

The court then compounded the error by slipping from claim preclusion (and merger) into issue preclusion and an ***estoppel*** analysis. The court continued:

> Accordingly, the City is estopped from pursuing claims which seek to invalidate such [MP I] benefits. Intervenors' special defense based on the

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[16] The only case cited by the court, *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 1770, does not support its analysis. In *Tomaselli*, plaintiffs brought the same claim (breach of contract) twice. *Id.* at 1769-70 ("The current lawsuit seeks recovery based on respondents' failure to pay the ***same claim*** which was the subject of action one."). The Court held that plaintiffs could not recover on their second claim because "[w]hen a party recovers a judgment for breach of contract, entry of the judgment absolves the defendant of any further contractual obligations, and the judgment for damages replaces the defendant's duty to perform the contract." *Id.* at 1770. That holding is irrelevant here. First, it addresses only breach of contract cases and resulting judgments. *Corbett* was not a breach of contract case and thus the settlement of that action did not and could not extinguish any contractual rights, meaning that contractual rights created by MP I survive. Second, *Tomaselli*'s rationale depends upon the ***same breach of contract claim*** being brought twice. *Id.* at 1769. Here, different plaintiffs (the *Corbett* class in action one and the City in action two) bring different claims and neither is a breach of contract claim.

> *Corbett* judgment is sustained. Benefits enacted by the *Corbett* judgment cannot be nullified in this action.

12 CT 3133:3-6 (citations omitted) (emphasis added). ***The court does not explain—nor can it—why it eschews the "actually litigated" requirement of collateral estoppel,*** or how estoppel applies when admittedly the issue on which the City supposedly is estopped (whether MP I violated conflict of interest or debt limit laws) was not "actually or necessarily" litigated in the earlier case. *See, e.g., Kaufman & Broad Cmtys., Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 224; *Le Parc Cmty. Ass'n v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1174.[17]

In short, whether claim or issue preclusion is considered, the *Corbett* judgment simply cannot bar or estop the City from litigating the conflict of interest claims or debt

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[17] To support this application of "estoppel," the court relies on *Sawyer v. City of San Diego* (1956) 138 Cal.App.2d 652, 662, and *City of Coronado v. City of San Diego* (1941) 48 Cal.App.2d 160, 172. Neither applies. Both *Sawyer* and *City of Coronado* stand for the principle that a party's behavior may estop him from changing his interpretation of a valid contract. *Sawyer, supra,* 138 Cal.App.2d at 660, 662 (holding that the City was estopped from changing its interpretation of a contract); *City of Coronado, supra,* 48 Cal.App.2d at 172 (holding that "City is estopped to insist now upon a different *interpretation* of the contract"). But this case involves neither contract interpretation nor a valid contract. Here, the City is not attempting to construe the terms of MP I or MP II differently than it has in past litigation, but is instead seeking to void MP I and MP II entirely, as the law demands. Further, because *Sawyer* and *City of Coronado* implicated valid contracts, the issue of whether subsequent behavior can ratify a void contract never arose. *Sawyer, supra,* 138 Cal.App.2d at 660 (holding that the City had the authority to enter into the contract); *City of Coronado, supra,* 48 Cal.App.2d at 173 ("The contract was valid when entered into and no good reason appears why . . . [it] should be held to be invalid."). The court repeatedly cites *Sawyer* for the proposition that standard principles of contract interpretation apply to contracts in which governmental entities are a party. *See* 12 CT 3130:9-12. *Sawyer* is not a Section 1090 case, however, and it does not stand for the proposition that a subsequent contract can validate an earlier Section 1090 violation.

limit violations regarding MP I in this action. The trial court's conclusion to the contrary is erroneous as a matter of law.

2. Ratification Or Estoppel Will Not Cure a Section 1090 Violation and the Court Erred In Relying On Those Theories

The court's discussion also suggests that in addition to a ***judicial*** bar or estoppel arising from the *Corbett* judgment, it may be relying upon a ***contractual*** ratification or estoppel analysis, based on the City's agreement to settle *Corbett* and the various Memoranda of Understanding (MOUs) adopted after MP I. If the court's theory is that the City contractually ratified or validated the prior conflict of interest violations, and therefore is "estopped" to challenge the illegal benefits awarded, the court is seriously mistaken on that ground, as well.[18]

As the City has demonstrated repeatedly—before trial, at trial, and after trial in its Proposed Statement of Decision—the case law and treatise authority unanimously recognizes that a Section 1090 violation makes the resulting governmental action ***void*** (not merely voidable). *See supra* at 29-30. And, critically for present purposes, not only is the government action void *ab initio*, but ***it may not be validated by ratification or estoppel***. *See Berka v. Woodward* (1899) 125 Cal. 119, 129 (the fact that claim was allowed by the council did not give it validity that it did not otherwise possess; contract based on conflict of interest was void); *see also City Lincoln-Mercury Co. v. Lindsey* (1959) 52 Cal.2d 267, 274 ("A party to an illegal contract cannot ratify it, cannot be

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[18] In fact, the trial court expressly recognized that the 1998 MOU process was not a ratification of an earlier contract. 12 CT 3151:27.

estopped from relying on the illegality, and cannot waive his right to urge that defense"); *Fewell & Dawes v. Pratt* (1941) 17 Cal.2d 85, 91 ("An illegal contract cannot be ratified, and no person can be estopped from denying its validity"); *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 511 ("An illegal contract is void; it cannot be ratified by any subsequent act, 'and no person can be estopped to deny its validity.' It is clear that estoppel cannot be relied upon to defeat the operation of a policy protecting the public.") (citation omitted); *accord Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1129 (an illegal clause in a settlement cannot be immunized or ratified by approval of the settlement); *see generally* 1 B.E. Witkin, Summary of California Law, Contracts § 432 (10th ed. 2006) ("Because an illegal contract is void, it cannot be ratified by any subsequent act, and no person can be estopped to deny its validity").

The presence of third party beneficiaries, even innocent ones, cannot avoid this result. It is hornbook law that "[a] third person for whose benefit an illegal contract is made does not, as a rule, acquire any rights thereby." 17A C.J.S. *Contracts* § 286 (2005). Rather, as discussed, disgorgement is mandatory. *See supra* at 29-32. *See also Miller v. City of Martinez* (1938) 28 Cal.App.2d 364, 370-72 (city could recover price of goods received under contract void for conflict of interest without returning goods; because the contract was void as against public policy, "there is no ground for any equitable considerations, presumptions or estoppels"); *accord G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1094 (estoppel may not be invoked to enforce a void contract).

The court's decision cites no authority permitting the City Council to impliedly ratify (whether through MOUs or case settlements) an earlier action taken with an invalidating conflict of interest.[19] Indeed, the *Corbett* settlement did not even purport to ratify the prior illegal benefits: The *Corbett* settlement neither entailed nor contemplated confirmation of the underlying benefits.[20]

The only way for the prior illegal actions to be "ratified" would be for the court to void the wrongdoing and to remand for new proceedings free of the invalidating conflict, thereby ***curing*** the conflict. *E.g., Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-77. The MOUs and *Corbett* settlement do not constitute such a cure, which requires disclosure of the disqualifying conflict and a new governmental action taken without participation of the disqualified officials or in compliance with the rule of necessity. *Ibid.* The MOUs and *Corbett* accomplished none of this: There was no disclosure of the prior violation and the conflicts of interest; indeed, the MOUs and the *Corbett* settlement were negotiated and approved by many of the same officials behind the scheme in MP I and MP II.

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[19] To the contrary, the City Council had a duty to set aside actions taken with a disqualifying conflict of interest. *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 289-93 (upon violation of Section 1090, city council had duty to declare resulting action void).

[20] *See* 20 RT 3376:18-26 ("Q. Was the MP I base numbers. . . would they have any part of this settlement in *Corbett*? . . . A. No. They were not part of the consideration for the settlement."); 20 RT 3377:26-3378:8 ("A. You just asked me questions about whether *Corbett*—whether there was a validation hearing for MP I. Not that I know of. And *Corbett* certainly was not a validation hearing for MP I. Q. And it had nothing to do with MP I? . . . A. No, it had nothing to do with the consideration that was given for the settlement."); 20 RT 3377:28-3378:1 (*Corbett* "certainly wasn't a validation hearing for MP-1").

In sum, the court's conclusion that the illegal MP I benefits were validated *sub silentio* through the *Corbett* settlement or subsequent MOUs is erroneous as a matter of law. Indeed, the error in the court's decision on this issue is confirmed by the internal inconsistency arising from its holdings: The court holds that MP I benefits could not be challenged because they had been ratified by the *Corbett* settlement and related MOUs, but the court would permit the City to proceed with limited claims based on MP II, *see infra*, notwithstanding that MP II added on to the MP I benefits and it, too, has been followed by MOUs.

3. The Court Erred In Finding that *Corbett* Superseded MP I

Intermingled with the concepts of preclusion by judgment and ratification by contract is the trial court's related notion that the *Corbett* settlement ***superseded*** MP I by substituting entirely new retirement benefits in lieu of those adopted in MP I. 12 CT 3117:3-6 ("the court concludes the City cannot go back and undo the MP 1 benefits since those benefits were replaced by the City's creation of benefits for all pension participants in the *Corbett* judgment"). Although inchoate, the reasoning apparently is that these superseding arrangements render a dispute regarding the legality of MP I moot. This, too, is legal error.

First, the concept of adopting a superseding contract (whether settlement agreement or MOU) is a different way of saying that the City officials ratified or waived the prior illegality by subsequent contract, which, as shown, cannot be done. *E.g.*, *City Lincoln-Mercury Co. v. Lindsey*, *supra*, 52 Cal.2d at 274 ("A party to an illegal contract cannot ratify it, cannot be estopped from relying on the illegality, and cannot waive his

right to urge that defense"). While the court's theory is that the new MOU process or the *Corbett* settlement cured the prior violation because it was a new action by a new City Council vote, that "cure" is merely an improper ratification (approval without disclosure and voiding of the original wrongful action), not a true cure through the remedy required by law (voiding, disclosure and new action).

This distinction is not form over substance: The problem with MP I (and MP II) is not just that the SDCERS Board members voted and enabled their own benefit increases. The problem is more insidious and pervasive in that the Board members also installed a grossly underfunded pension system that lost funding ground and solvency over time. ***Subsequent action to approve additional benefit increases on top of the earlier illegal ones does not cure the fundamental financial instability, which arose because of the concomitant underfunding, that was built into the system and that remains today.*** *Corbett* and the MOUs upon which the trial court relies did nothing to cure (or even address) the funding side of the illegality equation.[21]

The defect in reasoning can be seen in the trial court's particular reliance on intervening MOUs and the suggestion that those MOUs impliedly ratified the illegal MP I benefits. 12 CT 3129:14-17 ("the benefits in effect at the time of the *Corbett*

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[21] *Gleason*, discussed *infra*, did address a portion of the funding shortfalls resulting from MP I and MP II, but as the trial court's decision recognizes, allegedly did not resolve all claims of underfunding because of the limitations on the scope of the *Gleason* class. 12 CT 3117:22-28; 12 CT 3146:2-3. Moreover, the *Gleason* settlement addressed only the City's failure to make the actuarially-required contributions in certain years and prevented underfunding on a going forward basis, it did not resolve the massive accumulated debt that has resulted from the benefit increases built into the system when MP I and MP II were adopted.

judgment arose under the 1998 MOUs and not the 1996-1997 MOUs alleged to be part of MP 1"); 12 CT 3133:20-22 ("The 96-97 MP I MOUs were no longer in effect at the time of the Corbett judgment. They had been supplanted by the 1998 MOUs"). Intervening MOUs as to benefits could not silently ratify the illegal MP I transaction because they do not address the underfunding side of the illegal action. Moreover, the conclusion that the MOUs superseded MP I benefits in their entirety is belied by the fact that the later MOUs relied upon by the Court expressly incorporated the terms of MP I. Exs. 1116.22, 1117.23, 1121.16, 1122.15, 1124.29, 1125.26; 12 CT 3133:22-23, n.2 ("The evidence at trial was entirely consistent with the case law which confirms that each new MOU is a new contract with terms and conditions ***negotiated in light of the others***.").[22]

Second, the record incontrovertibly confirms that the MP I benefits did not cease to exist through the *Corbett* settlement; rather that settlement (and MP II later) expressly preserved the pre-*Corbett* (*i.e.*, MP I) benefit structure, increasing the benefits in place

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[22] Moreover, the trial court ***twice*** misread the City's interrogatory responses. In its Proposed Statement of Decision, the Court stated that the City, in its discovery responses, did not list the 1998 MOUs as challenged. 12 CT 3035, n.2 (Proposed Statement of Decision). The trial court, however, failed to acknowledge that the interrogatory did not ask for challenged ***agreements***, but rather only for challenged ***ordinances***. Ex. 1250.4 ("please identify, *by San Diego* ***municipal ordinance number*** . . . each and every benefit . . . which you contend is illegal.") (emphasis added). To correct the trial court's misunderstanding of the City's discovery response, the City explained that the interrogatory did not ask for a list of challenged agreements, but rather only for challenged ordinances. 12 CT 3070:23-3071:4 (City's Objections). The trial court then compounded the error: In its Decision, the court stated that the City's discovery response did not list the ***ordinances*** implementing the 1998 MOUs. 12 CT 3133:21-28. That is wrong. The City's discovery response clearly lists the 1998 ordinances as challenged. Ex. 1250.4 (listing O-18520, enacted May 26, 1998, and O-18600, enacted November 10, 1998). Thus, the City has never accepted that MP I benefits were abolished *sub silentio* by 1998 benefits or 1998 MOUs.

and building upon that existing structure. Indeed, David Arce, the Benefits Administration Director for SDCERS, 11 RT 1136:20-24, testified that the *Corbett* settlement ***did not modify the MP I benefits***. 12 RT 1338:27-1339:5 ("Q. And how so if they were [modified]? A. Well, they were ***not modified***. The *Corbett* [sic] allowed a 10 percent increase on those existing [MP I benefits] ...."); *see also* 12 RT 1340:3-4 ("A. Well, the *Corbett* – if you were going to select those factors, you get a 10 percent ***increase*** in your [MP I] benefit...." (emphasis added).[23]

From the Unions' perspective, as one member of the Union negotiating team confirmed, the MP I benefits were already in their pockets when *Corbett* was negotiated. 11 RT 1092:24-27 ("Q. By the time that you got to Corbett in 2000, you already had the 1997 benefit in your pocket, correct? A. Yes, sir."). As to those who remained active employees on July 1, 2000, they, too, received an ***increase*** in their retirement factor. Ex. 930.10:8-18; 930.11:3-14, 24-28 (*Corbett* settlement). Accordingly, it is simply impossible to find correctly that *Corbett* superseded MP I; it did not.

Undeniably, throughout its discussion, the court recognizes that the effect of *Corbett* was to ***increase existing benefits***—not to put in place an entirely new top-to-

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[23] *See* 20 RT 3348:2-21 (explaining that "what *Corbett* settled for was the plaintiffs giving up their claims for those additional pay items to be added on in exchange for an increase in retirement benefits . . . . There was a negotiation that provided increased retirement benefits to both active employees and retired employees, and "**it was that increase that was the consideration for the settlement of *Corbett* . . . .**") (emphasis added); *see also* 20 RT 3358:20-27 (explaining that the *Corbett* settlement entailed only a percentage increase factor, not any particular value to each individual beneficiary; the "increase remains the same" and "the consideration for the *Corbett* settlement was that increase."); 20 RT 3344:13-15 (Hopkins was the lead counsel in *Corbett* for both City and SDCERS.); 20 RT 3344:19-25 (Hopkins was "intimately involved in all negotiations for settling the lawsuit every step of the way.")

bottom benefit structure that "superseded" MP I. *See* 12 CT 3129:17-22 ("Those already retired . . . as of July 1, 2000, were to receive seven percent (7%) ***increase*** in their benefits. The retroactive portion (obviously calculated on their ***then-existing benefits***) was to be paid in lump sum and then-future benefits would go forward increased 7% over what they were at the time of the judgment") (citation omitted); 12 CT 3129:9-13 ("The [active] employees are given an option: they can accept a new "retirement factor," or a 10% ***increase in benefits*** using the retirement factors in effect as of June 30, 2000."); 12 CT 3130:18 (settlement used a "percentage increase in benefits"); 12 CT 3130:22-24 ("The *Corbett* settlement and judgment were entered in May of 2000 and it repeatedly refers to benefits ***in effect at that time"***); 12 CT 3132:16-19 ("The *Corbett* judgment itself clearly states the settling parties are receiving increased retirement benefits . . .") (emphasis added).

Thus, the benefits illegally approved in MP I did not evaporate with subsequent events—they remained the benefit "foundation" upon which the subsequent *Corbett* benefit increase "house" was built. When subsequent MOUs and the *Corbett* settlement increased benefits above that faulty foundation (without disclosing, examining or curing the prior illegality), the foundation remained rotten, and its defects were not cured by layering on still more increases—that is nothing more than an alternative form of impermissible ratification.

Indeed, the court's decision bears this out: "[B]oth management and the employees used the old expiring MOU as the starting point for the new round of negotiations. The new MOU would then reflect ***the mix of old and new benefits***

produced by the negotiation process." 12 CT 3120:16-20 (emphasis added); *see also* 12 CT 3131:20-23 ("the Judgment had to be based on the benefits the retired were already receiving at the time . . . ."); 12 CT 3133:1-3 ("[t]he benefits in effect at the time of, ***and underlying, the Corbett Judgment, including benefits funded under MP I,*** cannot now be set aside because doing so would invalidate the *Corbett* Judgment."). (emphasis added.)

In other words, the original illegal benefit increases in MP I remain in place notwithstanding *Corbett*. This continuing viability of the pre-*Corbett* Factor is confirmed by the ordinance implementing the *Corbett* settlement. *See* Ex. 1193.11-12. (preserving option to elect use of prior "unmodified" factor).

The ongoing viability of the original, illegal benefits is also apparent from the face of the Ordinance later adopting MP II, as well as contemporaneous and subsequent documents. The MP II Ordinance set forth an increase in the General Members' retirement factors, which could be calculated in a number of ways: (1) "Old Factor"; (2) "*Corbett* Factor"; or (3) "New Factor." Ex. 74.9. The "Old Factor" is the June 30, 2000 basis, *i.e.*, the pre-*Corbett* amount or the MP I amount. Ex. 74.5-74.6, 74.9. Under MP II, adopted in 2002, long after the *Corbett* settlement, employees may elect to have their retirement benefits calculated under the Old Factor, the *Corbett* Factor ***or*** the New Factor. Ex. 74.5-74.6.[24]

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[24] It is clear that at the time MP II was agreed to in 2002, the participants believed MP I remained in effect notwithstanding the *Corbett* settlement. *See* Ex. 109, at ¶¶ 1, 6 ("On July 11, 2002, after due consideration, the Board approved modifications to Section 3 of the Manager's Proposal, contingent on an appropriate written agreement being

The current MOUs with the Unions maintain this formula, expressly providing that the "Old Factor" remains an alternative for calculating benefits. *See* Ex. 1126.27 (Memorandum of Understanding between the City of San Diego and Local 127) (General member may elect "to have his or her Allowance calculated using the Old Factors . . . or the Corbett Factors"). Thus, it is evident that *Corbett* did not supersede the MP I benefits.

Moreover, the court's finding that *Corbett* superseded MP I for "all" employees is incorrect on another ground. As the court is forced to recognize in a footnote, some employees retired pre-*Corbett* (and pre-1998 MOU) ***based on the terms of MP I***. 12 CT 3133:20-28.[25] While *Corbett* provided those employees with a benefit ***increase*** (a percentage of their ***existing benefits***) to satisfy their *Ventura* claim, it is indisputable that those employees' retirement benefits remain predicated upon MP I. 12 CT 3124:14-18 (*Corbett* "increased the ***existing benefits*** for the already retired by seven percent") (emphasis added)).

Nonetheless, despite repeated recognition that *Corbett* and intervening MOUs built upon (and hence did not supersede) illegal MP I benefits, ***which remain in place***, the trial court concludes that *Corbett* bars litigation regarding the legality of MP I benefits because *Corbett* ***replaced*** MP I by enacting new benefits:

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entered into between the City and the Board").

[25] 12 CT 3133:24-26 ("The grant of benefits by the City to its' [sic] employees challenged by the City as part of MP 1 were no longer in effect (***except for those who retired under MP 1***) since the new 1998 MOUs were in effect by the time the Corbett Judgment was entered") (emphasis added).

> The position of the City in this litigation is not supported by the evidence of the intent of the parties from the *Corbett* Judgment itself. The Judgment clearly uses the benefits in effect as of June 30, 2000, as the basis for the computation of the "new" *Corbett* benefits. If the City's interpretation of *Corbett* is correct, one would have to postulate that the parties agreed upon increases of 7% and 10% with no reference point. Taking the City's interpretation of *Corbett* to the extreme, the 7% and 10% increases would apply to zero since the underlying benefits are void. This clearly contradicts the evidence of the intention of the parties from the judgment itself, as well as the City's own witnesses who testified the case settled for an ***increase in retirement benefits***.

12 CT 3131:1-9 (emphasis added); *see also* 12 CT 3132:17-23 ("The most reasonable interpretation of the judgment that accords with the wording of the judgment itself and the facts in existence in May of 2000 is that ***new retirement benefits*** were created in *Corbett*"). That notion of entirely new ground-up benefits awarded in *Corbett* is facially inconsistent and wholly irreconcilable with the court's repeated recognition that *Corbett* built upon, added to and ***increased the existing benefits*** already in place under MP I.

The court appears to conclude that *Corbett* validated the earlier MP I benefits because *Corbett* awarded a percentage of those benefits and the percentage increase had to be based on something—not on zero—so this settlement validated the entire benefit structure. Stated differently, MP I benefits could not be extricated from the *Corbett* settlement. However, SDCERS' own Benefits Administrator Director disagrees. David Arce testified as follows: "Q. If the municipal code is changed and you are told to go back and recompute their pensions, you have the ability to do that? A. Yes." 12 RT 1366:20-23.

Even if the *Corbett* settlement did seek to validate the underlying MP I benefits, however, as discussed, that approach would not cure the prior illegality because there was

no disclosure of the violation or a re-vote with full information.[26] And, as the court is repeatedly forced to concede, the old MP I benefits were used to calculate the percentage increase—which formed the settlement consideration—and the settlement itself was only the increased benefit amount, not the entire award of total benefit amount.

Notwithstanding *Corbett*, MP I is alive and well, a result that in no way undermines the consideration for the *Corbett* settlement.[27]

In short, rather than justifying the result, the court's recognition that *Corbett* was an ***increase*** over ***existing benefits*** which had their genesis in MP I simply confirms that *Corbett* rests on the faulty MP I foundation. To void the MP I benefits does not, as the court postulates, require that the court undo the *Corbett* judgment—the incremental

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[26] *See supra* at 66. The trial court tries to answer this deficiency with an ***implied*** curative procedure. 12 CT 3132:3-7 ("one would have to postulate that at the time the parties on all sides agreed to new Corbett benefits, they did so with no understanding of the cost and economic benefit of the new benefits. In other words, if the increases do not apply to and modify the benefits in existence as of June 30/July 1, 2000, what are they?").

[27] Contrary to the Court's suggestion that the City changed its position regarding the manner by which *Corbett* could stand and the illegal benefits could be invalidated, the City's position has remained constant throughout this litigation. Just as it argued at trial, the City showed at the hearing on its objections that the *Corbett* increase could be calculated based on then-existing benefits, including MP I benefits, and that amount applied to remaining legal benefits to preserve the consideration for the settlement. 31 RT 5942:14-5944:20 (explaining that one may calculate the *Corbett* increase and then subtract the illegal benefits). Indeed, counsel for the City relied on the very same report one of its witnesses, Actuary Joseph Esuchenko, used at trial, 31 RT 5942:17 (citing Esuchenko report, Ex. 1446), which demonstrates that the same argument and support were presented at trial.

increases awarded in lieu of *Ventura* benefits can be maintained—it merely means that ***the underlying benefits*** arising from MP I are void.[28]

D. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE *GLEASON* SETTLEMENT BARS LITIGATION AS TO THE LEGALITY OF THE BENEFITS

The trial court's misreading and misapplication of *res judicata* principles continued with its use of a subsequent settlement agreement to bar the bulk of the City's claims as to MP II. That settlement arose out of the *Gleason* litigation, which in reality was three separate lawsuits, ultimately consolidated for purposes of settlement. As discussed, to determine whether a claim is barred under *res judicata* principles, courts must examine whether: (1) the cause of action or issue decided in the prior adjudication is identical with the one presented in the action in question; (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication. *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 604. These criteria are not satisfied with regard to the *Gleason* litigation.

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[28] As the trial court notes, the City does not challenge the *Corbett* judgment. 12 CT 3117:2-6; *see also* Ex. 779.58 (City's interrogatory response stating that it does not challenge the *Corbett* judgment); Ex. 1260.63 (same). The trial court has turned the City's interrogatory response that it does not challenge the incremental increase in benefits adopted by *Corbett* into an erroneous conclusion that the City thereby waived its entire challenge to MP I. This is a two-fold error. First, the Court itself recognizes that *Corbett* only increased the benefits above the prior base level, meaning that the lack of a challenge to *Corbett* means nothing about the challenge to the underlying benefits. *See supra* at 70-71 and n.23. Second, and more important, as discussed, Section 1090 violations are not subject to defenses of waiver. *See supra* at 64-65, 67-68.

1. The *Gleason* Settlement Does Not Bar this Case Because There Is No Identity of Parties or Issues

To understand the utter impossibility of properly applying claim or issue preclusion to the City in this case based on the *Gleason* settlement, it is important to understand the issues and parties in each of the three separate cases. The City was a party only in *Gleason I* (*Gleason v. San Diego City Employees' Retirement System, et al.*, San Diego Superior Court Case No. GIC 803779). That case did not involve employee pension benefits or conflict-of-interest issues; it solely involved the claims regarding the pension system's ***funding***. *See* 12 CT 3127:4-7 (*Gleason* complaint "alleged the funding relief granted in 1996 and 2002 violated the City Charter by allowing the City to contribute at less than the actuarially required level"). *See also* Ex. 433; 21 RT 3595:10-21 (Pestotnik testimony).

In 2004, the City settled *Gleason I*, with an agreement to make actuarially-required contributions to SDCERS commencing in 2006 and on an ongoing basis thereafter. *See* Ex. 433. Thus, although MP I and MP II were ***prospectively*** terminated as a funding mechanism, *Gleason* had no impact whatsoever on benefits: ***MP I and MP II allegedly continue to obligate the City to fund—on an ongoing basis—past and future benefit increases resulting from those unlawful agreements***. Ex. 2188, ¶¶ 3, 4; 1 CT 139, ¶ 4; Ex. 2190, ¶ 17.

As for the other two cases, *Gleason v. San Diego City Employees' Retirement System, et al.*, San Diego Superior Court Case No. GIC 810837 ("*Gleason II*"); and *Wiseman v. Board of Administration of the San Diego City Employees' Retirement*

System, et al., San Diego Superior Court Case No. GIC 811756 ("*Wiseman*"), of those two, only *Gleason II* involved the conflict of interest issues. Critically, however, the City was not a party to *Gleason II*. *See* 12 CT 3127:10-12 ("The City was not a defendant in this action").

Thus, in the only case that involved Section 1090 (*Gleason II*), the City was not a party; in the case in which the City was a party (*Gleason I*), there was no Section 1090 claim. The settlement agreement expressly recognizes this fact, providing that the **City was not a party to the *Gleason II* or *Wiseman*, but rather only was a party to *Gleason I*.** *See* Ex. 433.3, ¶¶ 5, 6; *see also* 21 RT 3609:23-25 (Testimony of Timothy Pestotnik, outside counsel for the City in *Gleason*) (stating that the City was not a party to *Gleason II*); 21 RT 3594:3-18 (Section 1090 and *Gleason II* and *Wiseman* were not litigated or settled); 21 RT 3634:2-14 ("1090 was not a claim the City was facing"; "the only thing that changed was the funding mechanism"); 21 RT 3595:10-21 (*Gleason I* was solely an underfunding case; the City and SDCERS were codefendants in that case and SDCERS did not have a claim against the City).

Because it was not a party, the City is not bound by the settlement of *Gleason II*—the only case to raise Section 1090 issues, as the trial court recognized. 12 CT 3148:4-9. *See also Am. Bankers Ins. Co. v. Avco-Lycoming Division* (1979) 97 Cal.App.3d 732, 737 ("A dismissal with prejudice in one case, however, does not result in the termination of all litigation involving the same facts. It is a judgment on the merits only as between the plaintiff in that case and defendants.").

Notwithstanding the fact that the City was not a party to the only case that raised the legality of the benefits issue, however, the trial court nonetheless held that because the City failed to challenge the legality of the pension benefits as a compulsory cross-claim in *Gleason I*, the City was barred under *res judicata* by the *Gleason* settlement from pursuing a claim as to most of the MP II benefits at issue. 12 CT 3117:24-3118:2. Only as to those pension beneficiaries who retired after July 2004, and who therefore were not included in the *Gleason* class, may the City proceed to assert its cause of action that MP II violated Section 1090 under the court's decision. *Id.* This application of *res judicata* is erroneous as a matter of law.

The sole issue in *Gleason I* (the only case in which the City was a party) was the whether the City had underfunded the pension system by failing to make the annual employer contribution determined by the SDCERS actuary and approved by the SDCERS Board. As noted, conflicts of interest and the legality of benefit increases were not at issue in *Gleason I*. *See also* 12 CT 3120:27-28 ("As used in the *Gleason* litigation," the terms [MP I and MP II] appear to have referred to the SDCERS contribution relief only," not "the employee retirement benefit increases").[29]

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[29] *See also* 12 CT 3127:26-28 ("Mr. Pestotnik confirmed the *Gleason* settlement eliminated the under funding provisions of MP 1 and MP 2. He also testified it did not deal with the benefits enacted by the City"); 21 RT 3597:4-8 (Testimony of Timothy Pestotnik) (stating no recollection of any effort in connection with *Gleason* to validate the terms of MP I); 21 RT 3630:2-9 ("Q. So your recollection is that you never made the mayor and city council aware of the allegations of a 1090 violation? A. . . . I was not asked to brief [City officials] on 1090 and its application to . . . *Gleason I* because it wasn't alleged in *Gleason I*."); 21 RT 3634:5-10 (explaining that "1090 was not a claim that the City was facing," . . . "[s]o the City wasn't eliminating any risk on 1090 by virtue of settling with this class.").

Despite the lack of identity of issues, however, the trial court found the City barred from asserting its conflict of interest claim in this case under the "should have been raised" bar/merger aspect of claim preclusion. The court reasoned that because the City asserts in this case that underfunding and benefit increases were a *quid pro quo* and inextricably linked in MP I and MP II, the City was required to assert its illegality of benefits claim as a compulsory cross-claim in response to plaintiffs' underfunding claim in *Gleason I*. 12 CT 3117:17-3118:2; 12 CT 3114:27-3145:2.

The fundamental problem with this analysis, however, is that SDCERS, the target of the City's illegal benefit claim in this action, was the City's ***codefendant*** in *Gleason I*. 12 CT 3144:3-5 ("*Gleason I* included a plaintiff class of retirees and former employees whose pension benefits were funded under MP 1 and MP 2, ***with SDCERS and the City as defendants***.") (emphasis added). Thus, SDCERS and the City were both defendants in that case and co-parties—not adverse parties. *See* Ex. 961. *See also* 21 RT 3595:10-17 (Testimony of Timothy Pestotnik, outside counsel for the City in *Gleason*) (stating that the City and SDCERS were co-defendants in *Gleason I*).

The law is clear that the failure to bring a cross-claim against a codefendant will not support a *res judicata* bar in a subsequent lawsuit. *See Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1155 ("collateral estoppel does not apply against parties who were codefendants in a former action."); *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 769 ("Ordinarily, therefore, where the plaintiff and defendant in the subsequent action were merely codefendants in the original action, the prior judgment cannot be used by one against the other as an

estoppel since they were not adversary parties in the original action and no issues were raised or adjudicated between them therein."); *Atherley v. MacDonald, Young & Nelson, Inc.* (1955) 135 Cal.App.2d 383, 385 ("[I]n no event is a judgment in an action in which the parties were not adversaries, but only joined as codefendants, res judicata as between them in a later proceeding."). *Cf. Am. Bankers Ins. Co.*, 97 Cal.App.3d at 735 ("As between defendants, the cross-complaint is not compulsory; it is only compulsory between plaintiffs and defendants."). *Accord* 12 CT 3143:21-24 ("A party against whom a complaint is filed and served must assert in a cross-complaint any related cause of action he or she has against ***the plaintiff***") (emphasis added).

The court glosses over this established rule, merely stating that "[w]ell established California law requires ***the parties*** in litigation to bring all claims relating to the same transaction into the action litigating the legality of the transaction." 12 CT 3117:17-20 (emphasis added). The court states that the City failed to challenge the MP I and MP II transactions "when the City had a legal duty to do so," 12 CT 3117:25-26, ignoring the established law holding that the City had no legal duty whatsoever to assert claims ***against codefendant SDCERS***.

Here, the City's claims are against SDCERS. There can be no contention that SDCERS and the plaintiff beneficiaries in *Gleason* were in privity in that prior litigation; the beneficiaries ***sued SDCERS*** in *Gleason I* and they were ***adversaries***. Reduced to its essentials, the court's ruling is that the City's claims ***against SDCERS*** are barred because the City failed to assert claims against entirely separate, adverse and absent parties—the *Gleason I* plaintiffs—a clear error. Moreover, the City had no legal duty in *Gleason* to

assert claims against the Unions, ***who were not parties at all in Gleason I.*** 12 CT 3127:3-17 (describing *Gleason* parties).

Equally troubling, as discussed, many of the individual pension beneficiaries ***have not been named as individual defendants in this case.*** Yet the court's *res judicata* theory is that the City's claims are barred because the City failed to assert a compulsory cross-claim against the pension beneficiaries, who were class plaintiffs in *Gleason I*, but who are absent from this case. Thus, under the court's reasoning, the City's claims in this action are barred because the City failed to assert a claim in prior litigation against persons ***who are not parties to this case.*** 12 CT 3142:28 – 3143:7 ("***if*** the court ordered joined the absent, but necessary, participants from *Gleason I* in this action, the *Gleason* settlement and judgment would bar the City's claims against such individual participants in this action under the doctrine of res judicata because the City's claims in this action would have been the subject of a compulsory cross-complaint in *Gleason I*") (emphasis added). ***The court essentially uses its improper party joinder analysis to bootstrap a claim preclusion bar based upon absent parties.***

The court cites no authority for the novel proposition that claim preclusion applies to defeat claims in a subsequent case between ***different parties***. Rather, the essence of claim preclusion is that it applies in subsequent litigation between the same parties or their privies. *See, e.g., Border Business Park, Inc. v. City of San Diego*, 142 Cal.App.4th at 1563 ("In its primary aspect the doctrine of res judicata [or 'claim preclusion'] operates as a bar to the maintenance of a second suit between the ***same parties*** on the same cause of action.") (emphasis added).

2. The *Gleason* Settlement Agreement Confirms that *Res Judicata* Does Not Bar the City Claims Here

The terms of the *Gleason* settlement itself also preclude a finding of *res judicata*: Unlike the plaintiffs, the City did not provide releases in the *Gleason* settlement. Ex. 433.13 (¶ 4) ("***Plaintiffs***, individually and on behalf of the Settlement Class, and each member of the Settlement Class . . . ***hereby release***, discharge and dismiss with prejudice the City and SDCERS . . .from any and all claims") (emphasis added). The City and SDCERS were co-parties, as defendants, and did not release their claims. *Id. See also* 21 RT 3595:10-21. By its plain terms, then, the *Gleason* settlement does not specify that the City releases any claims arising out of MP I and MP II, nor in particular its Section 1090 claims against codefendant SDCERS.

Moreover, the *Gleason* settlement expressly disclaims any determination of liability on the part of the City. *See* Ex. 433.15-16 (¶ 8). ("This Agreement, its constituent provisions, and any and all drafts, communications and discussions relating thereto, ***shall not be construed as or deemed to be evidence of an admission or concession by any party, including the City*** or SDCERS, and ***shall not be*** offered or ***received in evidence*** . . . in these Actions or any other action or proceeding ***as evidence of such [an] admission*** or concession") (emphasis added).

This express limitation on the City's liability also precludes a finding of *res judicata* against the City. *See Clovis Ready Mix Co. v. Aetna Freight Lines* (1972) 25 Cal.App.3d 276, 284-85 (holding first corporation's settlement with employee of second corporation, followed by entry of judgment of dismissal with prejudice was not *res*

judicata barring subsequent lawsuit by first corporation against second corporation arising out of same event where release in settlement of first lawsuit expressly disclaimed determination of liability); *see also Bleeck v. State Bd. of Optometry* (1971) 18 Cal.App.3d 415, 429 (same). *See generally* 1 Ann Taylor Schwing, *California Affirmative Defenses* § 14:17 (2006 ed.) ("The litigants or the court may exclude issues from the [res judicata] category of those that might have been litigated. In such a case, the judgment is not res judicata or collateral estoppel as to the deliberately excluded issues").

3. *Res Judicata* and Collateral Estoppel Do Not Preclude Full Litigation of this Case Because of the Intense Public Interest In This Matter

Finally, *res judicata* does not bar a claim when such a finding is against the public interest. "[W]hen the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed." *Arcadia Unified Sch. Dist. v. State Dep't of Educ.* (1992) 2 Cal.4th 251, 257; *see also Kopp v. Fair Pol. Practices Comm'n* (1995) 11 Cal.4th 607, 622 ("we conclude this is a matter in which the public interest requires that relitigation not be foreclosed, and hence reject the claim that the doctrines of res judicata or collateral estoppel bar consideration of the state law issue in this litigation"); *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 (explaining public interest bar to foreclosing litigation); *Chern v. Bank of America* (1976) 15 Cal. 3d 866, 873 (there is a "sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest"); *Ewing v. City of Carmel-By-The-Sea* (1991) 234

Cal.App.3d 1579, 1586 (refusing to apply collateral estoppel in a challenge to a zoning ordinance because the public interest in zoning warranted revisiting the issue).

Plainly, given the strong policy behind the good government laws, and the amount of public funds at issue here, it is imperative that the merits be exposed to the light of judicial examination.

E. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE STATUTE OF LIMITATIONS HAD EXPIRED

Prior to the City's filing of its 6ACC, the trial court had ruled that the City's 5ACC was not barred by the either the three-year statute of limitations codified in California Code of Civil Procedure ("CCP") § 338(a) or the one-year statute of limitations codified in CCP § 340(a). The court specifically ruled that "paragraphs 53 through 65 of the 5ACC sufficiently allege tolling due to a conspiracy to conceal defendants' wrongdoing. Thus, whether any aspect of this action is time-barred ***is a question of fact that cannot be determined via this demurrer.***" 9 CT 2250 (Court's Final Ruling Re: SDCERS' Demurrer to Fifth Amended Cross-Complaint, dated July 10, 2006) (emphasis added). The 6ACC contains precisely the same allegations with regard to tolling the statute of limitations as the City's 5ACC. 4 CT 955:1-957:27 (5ACC); 13 CT 3243:18-3246:19 (6ACC).

In addition, the trial court previously found that the City specifically had pleaded (1) a continuing course of conduct "up to the present day" and (2) intentional concealment of the factual basis for this action. 13 CT 3243:20-3246:19. As to these claims, there is no statute of limitations issue because they are based upon continuing obligations, as the

court already concluded. *See* 2 CT 519 (court held, "[w]ith regard to SDCERS argument that the statute of limitations has run, the City's contention that there has been a continuing violation and that the City is attempting to stop future distributions has merit . . . .").

Despite these earlier rulings, after the Phase I Statement of Decision, following the City's filing of its 6ACC, the Unions demurred on the grounds that the statute of limitations barred the Section 1090 claim. While the demurrer was under submission, the Court of Appeal published the decision of *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, which held that the statute of limitations for a Section 1090 claim was one year. Notably, *Brandenburg* did not find that the statute could not be tolled.

Relying upon *Brandenburg*, the trial court reversed its prior rulings and sustained the Union's demurrer to the 6ACC. 13 CT 3419:15-3420:14. The court reached a contrary conclusion to its earlier decision, holding that the "doctrine of fraudulent concealment does not toll the date of accrual to a time within the statute of limitations." 13 CT 3428:16-18 (Aug. 3, 2007 Order). Based on allegations in the 6ACC, judicial records the court *sua sponte* judicially noticed, ***and the decision in Phase 1***, the court found as a matter of law "the City certainly had knowledge of the facts underlying the Government Code section 1090 allegations on May 15, 2003, or at the latest the date of consolidation which was September 23, 2003." 12 CT 3127:8-12 (Statement of Decision); 13 CT 3432:3-6 (Aug. 3, 2007 Order).

This evidentiary assessment was premature under the court's own trial phasing order; in Phase 1, the court did not allow the City to introduce any evidence as to either the statute of limitations issues or the merits of the Section 1090 claims, which were reserved for Phases 2 and 3, respectively. 12 CT 3116:6-14.

The basis for the trial court's holding that the statute of limitations barred the 6ACC was that "*Gleason II* was filed on May 15, 2003, against SDCERS, and plaintiffs alleged the vote to approve under actuarial level funding in 2002 violated Government Code Section 1090, as the agreement was approved by SDCERS board members who were financially interested in the transaction." 13 CT 3431:23-27. The court conceded that "[w]hile the City was not a party to *Gleason II*, it was named as a defendant in the *Gleason I* action, a class complaint alleging the funding relief granted in 1996 and 2002 violated the City Charter by allowing the City to contribute at less than the actuarially required level." 13 CT 3431:27-3432:1. The court finds that because "[t]he *Gleason I* and *Gleason II* actions were consolidated before Judge Cowett on September 23, 2003 and a settlement was eventually reached," the City impliedly had the requisite knowledge of the conflict of interest violations so as to find as a matter of law that the City's tolling allegations were insufficient as a matter of law. 13 CT 3432:2-4.

1. The Court Erred In Sustaining the Demurrer by Deciding Disputed Fact Issues on Matters Outside of the Complaint

Because the function of a demurrer is to test the sufficiency of a pleading as a matter of law, a judgment sustaining a demurrer without leave to amend is reviewed de novo. *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420. The

court is to consider only matters pleaded in the complaint (or cross-complaint) or subject to judicial notice. *South Shore Land Co. v. Peterson* (1964) 226 Cal.App.2d 725, 732. The court assumes the truth of the allegations in the complaint, but need not assume the truth of contentions, deductions or conclusions of law. *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967. It is error for the trial court to sustain a demurrer if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment. *Ibid.*

The trial court ignored this standard, used extrinsic facts from Phase 1 of the trial and found that the City's Section 1090 claims were time barred. While the court previously held that the tolling allegations in the City's 5ACC, which are identical to the tolling allegations in the City's 6ACC, were sufficient to defeat a demurrer, the court reached a different result without purporting to reconsider. Additionally, the court specifically established Phase 2 of the trial for the sole purpose introducing evidence to determine whether or not the statute of limitations claims had expired. Yet, prior to entering Phase 2 of the trial, the trial court used evidence from outside of the pleadings—from Phase 1 of the trial, a phase in which none of the City's statute of limitations evidence was proper, 10 CT 2419, to make a determination that the statute of limitations has expired as a matter of law. This was error. *E.g.*, *Blake v. Wernette, M.D.* (1976) 57 Cal.App.3d 656, 660-661 ("Once it is determined that the elements of an estoppel have been sufficiently pleaded, however, the question whether the statute of limitations is

tolled by the conduct of the defendant is one of fact which should be left for resolution by a jury and not determined upon general demurrer. (citations omitted))."

2. Assembly Bill 1678, Signed Into Law on July 12, 2007, Amends and Provides a Four-Year Statute of Limitions for Gov't Code Sections 1090 and 1092

The trial court also erred in applying a one-year limitations period. On July 12, 2007, Governor Schwarzenegger signed into law Assembly Bill 1678 ("AB 1678"). AB 1678 amends Government Code § 1092 to provide that the statute of limitations for suits to void a contract in violation of Government Code § 1090 is now "four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation. . . ." Augmentation to CT 3401.2, filed Apr. 9, 2008.

In AB 1678's third reading, it was recorded in the official comments that:

> The bill's author states that defendants to Gov't Code § 1090 actions sought either a one year or three year of limitations from the date of the execution of the illegal agreement based on a forfeiture (one year) or breach of contract argument (three years). Whereas, public entities, the victims of Gov't Code § 1090 violations sought a four year, if not longer, statute of limitations, from the date of discovery of the illegal activity. The rationale behind the longer statute of limitations was that that Gov't Code § 1090 claims ***often involve coordinated action between members of approving boards and private parties. These people often hide their relationships to one another at the time of approval of the illegal contracts, and it is not until later that the public entities discover the illegal activities and seek justice under Gov't Code § 1090.*** Thus, the bill's author believes, a minimum of a four year statute of limitations from the date of discovery by the public entity of the illegality of the contract would protect a public entity's right to recovery under Gov't Code § 1090.

Augmentation to CT 3401.6, filed Apr. 9, 2008 (AB 1678, Assembly Third Reading) (emphasis added).

"While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute." *Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484. As the circumstances indicate, this amendment clarifies the legislature's true intent and is therefore retroactive and applies to this action.

Additional legislative history supports this conclusion. Specifically, the Senate Judiciary Committee notes, under the section entitled "Need for the bill," reference pending litigation (involving the City of South Gate), and manifest the intent to address limitations problems in ***pending*** cases:

> Apparently, ***defendants in the 1090 actions brought by the city of Southgate and by other public entities in similar situations have been asserting that the one-year statute of limitation for forfeitures apply*** to the public entities' claims. This bill would establish a four-year statute of limitations for 1092 actions that are based on violations of the conflict of interest prohibitions of 1090. It would therefore give public entities more time to gather information and develop their cases for voiding contracts that are grounded on violations of the public trust.

Augmentation to CT 3401.12, filed Apr. 9, 2008 (Senate Judiciary Committee Comment to AB 1678, June 19, 2007) (emphasis added). The official comments of the Senate Judiciary Committee further note that:

> Southgate has attempted to block some of the contracts Robles and his cohorts issued, with limited success. While the city is struggling with its financial condition, it has had to spend several million dollars in legal fees trying to undo bad deals from Robles' term of office. Because of the complexity of the cases, the city is running into statute of limitations problems in bringing lawsuits to avoid some of these contracts . . . .

> This bill would establish a four-year statute of limitations for commencing actions to avoid contracts where a violation of 1090 has occurred.

Augmentation to CT 3401.10-11, filed Apr. 9, 2008 (Senate Judiciary Committee Comment to AB 1678, June 19, 2007).[30]

Thus, the legislature amended Section 1092 precisely to address difficulties experienced in pending litigation, reflecting the legislature's intent to make the clarification retroactive in fulfillment on the important statutory purposes of Section 1092. In all events, the better-reasoned authority, predating this amendment and cited with approval by the legislature, is the "leading case," *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861:

> The leading case of *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861 found that actions brought under Gov. C. Sec. 1090 are subject to the statutes of limitations in the Code of Civil Procedure for actions other than for recovery of real property (C.C.P. 335 *et seq.*) and fall in the "catch-all" provision of Code of Civil Procedure Sec. 343: "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Augmentation to CT 3401.10-11, filed Apr. 9, 2008 (Senate Judiciary Committee Comment to AB 1678, June 19, 2007).

In contrast, it is apparent that *Brandenburg* is incorrectly decided. Under *Brandenburg's* rationale, the statute of limitations for a civil cause of action founded upon Section 1090 would be ***two years shorter*** then the statute of limitations for a

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30 The cases the committee referenced are the pending cases of *Community Development Commission of the City of South Gate v. The Village of South Gate, LLC, et al.*, Los Angeles Superior Court Case Number VC042662, and *Robles v. City of South Gate*, Los Angeles Superior Court Case Number BC334843.

criminal charge based upon the same conflict-of-interest violation. *Compare People v. Honig* (1996) 48 Cal.App.4th 289, 304 (criminal charges under Government Code section 1090 must be brought within three years from discovery). The *Brandenburg* rule would provide only a narrow one year window for pursuing civil conflict-of-interest cases while criminal prosecutions for the same conduct enjoy a three-year statute of limitations. This result is inherently suspect.[31]

Because the statute of limitations for a Section 1090 action is "four years after the plaintiff has discovered or in the exercise of reasonable care should have discovered the violation," and given the facts issues surrounding tolling and other limitations issues,[32]

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[31] *See generally* Andrew C. Bernasconi, Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights (2001) 50 Am. U.L. Rev. 979, 995-996 ("The historical purpose of criminal statutes of limitations is to promote repose. The statutory limitations ultimately preserve a defendant's right to assemble evidence and prepare a vigorous defense. The statutes protect defendants from an unfair trial by militating against prejudice caused by deterioration of evidence. This policy is premised, at least partially, on the theory that evidence inherently degenerates with the passage of time. Because the interests of a criminal defendant supersede those of a civil counterpart, ***criminal statutes of limitations are shorter in duration than civil statutes***.").

[32] In addition, the statute does not run when, as here, there are continuing payment obligations under an invalid law. Rather, if the City has an obligation to pay the challenged retirement benefits, that obligation "renews" each time payment is due. The continuing "installment" nature of pension contracts has long been recognized in suits involving payments under pension systems. *See Dryden v. Bd. of Pension Commissioners* (1936) 6 Cal.2d 575; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 462; *see also Dillon v. Bd. of Pension Commissioners* (1941) 18 Cal.2d 427, 430 (rights arising under pension installments run from the time each installment is allegedly due). And, in the broader public law context, a suit to enforce public rights that are alleged to be presently infringed can be brought so long as the alleged violation continues. *See, e.g., Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 822-24 (continuing unlawful expenditure of public funds is an ongoing wrong); *Coral Constr. Co. v. City of San Francisco* (2004) 116 Cal.App.4th 6, 26-27 ("hybrid" facial and as applied challenge

the Court erred in sustaining the demurrer to the 6ACC and entering judgment against the City.

VII.

CONCLUSION

The court's judgment against the City is contrary to law on the specific subjects covered—debt limit laws, *res judicata*, necessary parties, and the statute of limitations—but it also suffers from a more fundamental defect. Despite the equitable nature of declaratory relief, and the broad remedial goals of the good government statutes involved here, at every turn, the court chose the narrow reading over the broad, the technical analysis over the practical, and the palliative remedy over the curative one. The law requires just the opposite. At an absolute minimum, the crippling civic debt imposed by MP I and MP II deserves examination on the merits. The trial court's judgment of dismissal should be reversed.

Respectfully submitted,

Dated: April 18, 2008

MICHAEL J. AGUIRRE, City Attorney

By _____

Walter C. Chung, Deputy City Attorney
Attorneys for Appellants
CITY ATTORNEY MICHAEL AGUIRRE and the CITY OF SAN DIEGO

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to city ordinance and to Proposition 209 not barred by statute of limitations when claims asserted present continuing controversy regarding operation of unlawful ordinance); *see also Pac. Gas & Elec. v. City of Union City* (N.D. Cal. 2002) 220 F. Supp. 2d 1070, 1080 (statute of limitations did not expire to challenge city's continued imposition of allegedly unconstitutional fees).

CERTIFICATE OF WORD COUNT

The text of this brief consists of 27,477 words as counted by the Word 2003 word-processing program used to generate the brief.

Dated: April 18, 2008

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

APPELLANTS:	San Diego City Attorney Michael J. Aguirre and The City of San Diego	**SDSC JUDGE: Jeffrey B. Barton** **SDSC Dept: 69**
RESPONDENTS:	San Diego City Employees' Retirement System, by and through its Board of Administration; Local 127, American Federation of State, County and Municipal Employees; San Diego Municipal Employees' Association; San Diego Firefighters, Local 145; And the *Abdelnour* Plaintiffs	
PROOF OF SERVICE		**SDSC Case Number: GIC841845** **Court of Appeal Case Number: D051805**

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APPELLANTS' OPENING BRIEF

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